

78 Am. Jur. 2d Waters III A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Waters

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Eric C. Surette, J.D.

III. Particular Types of Waters or Water Bodies

A. Natural Watercourses

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Research References

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1060 to 1069, 1233, 1312 to 1338, 1426, 1457

A.L.R. Library

A.L.R. Index, Rivers and Streams

A.L.R. Index, Waters and Watercourses

West's A.L.R. Digest, [Water Law](#)  1060 to 1069, 1233, 1312 to 1338, 1426, 1457

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78 Am. Jur. 2d Waters § 86

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Waters

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III. Particular Types of Waters or Water Bodies

A. Natural Watercourses

1. In General

§ 86. Definition

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1063

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[Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030](#)

With regard to natural watercourses, the term "watercourse" has frequently been broadly defined as a stream of water flowing in a definite direction or course in a bed with banks.¹ An additional element is that a watercourse usually discharges into some other body or stream of water² although the fact that a stream may spread out over the land does not deprive the part that flows regularly through a channel of its character as a watercourse.³ According to another definition, the distinguishing characteristic of a watercourse is the existence of a stream of water flowing for such a length of time that its existence will furnish the advantages usually associated with streams of water, and it is the condition created by a stream having a well-defined and substantial existence.⁴

Ordinary flooding that connects any part of a stream or watercourse to a main body of water results in a "natural water course."⁵

The length⁶ or size⁷ of the stream is not material to the determination of the existence of a natural watercourse.

A "water course" may flow underground.⁸

Observation:

A state may have a method of affording public participation in connection with a determination whether a body of water is a "natural perennial-flowing stream" and thus subject to certain regulatory requirements.⁹

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Footnotes

- 1 [Bilo v. El Dorado Broadcasting Co.](#), 101 Ark. App. 267, 275 S.W.3d 660 (2008); [Hurlburt v. DeRosa](#), 137 Conn. App. 463, 49 A.3d 249 (2012); [Johnson v. Board of County Com'rs of Pratt County](#), 259 Kan. 305, 913 P.2d 119 (1996); [Maddocks v. Giles](#), 1999 ME 63, 728 A.2d 150 (Me. 1999); [Klokkenga v. Carolan](#), 200 S.W.3d 144 (Mo. Ct. App. W.D. 2006) ("living stream").
- 2 [Bilo v. El Dorado Broadcasting Co.](#), 101 Ark. App. 267, 275 S.W.3d 660 (2008); [Maddocks v. Giles](#), 1999 ME 63, 728 A.2d 150 (Me. 1999).
- 3 [McCausland v. Jarrell](#), 136 W. Va. 569, 68 S.E.2d 729 (1951).
- 4 [Libby, McNeil & Libby v. Roberts](#), 110 So. 2d 82 (Fla. 2d DCA 1959).
A watercourse is a stream of water of such well-defined existence as to make its flow valuable to the owners of land along its course. [Weck v. Los Angeles County Flood Control Dist.](#), 104 Cal. App. 2d 599, 232 P.2d 293 (2d Dist. 1951).
The essential characteristics of a watercourse are substantial existence and unity, regularity, and dependability of flow along a definite course. [Long v. IVC Indus. Coatings, Inc.](#), 908 N.E.2d 697 (Ind. Ct. App. 2009).
- 5 [Wimmer v. Compton](#), 277 Or. 313, 560 P.2d 626 (1977).
- 6 [Fitzstephens v. Watson](#), 218 Or. 185, 344 P.2d 221 (1959).
- 7 [Mader v. Mettenbrink](#), 159 Neb. 118, 65 N.W.2d 334 (1954).
- 8 [Town of Avon v. West Central Conservancy Dist.](#), 957 N.E.2d 598 (Ind. 2011) (aquifer was a watercourse); [Maddocks v. Giles](#), 686 A.2d 1069 (Me. 1996).
- 9 [Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.](#), 2008 MT 377, 346 Mont. 507, 198 P.3d 219 (2008) (whether slough was subject to various statutes under which a conservation district's approval was required of a project that would alter a stream; process used was fundamentally fair and provided a reasonable opportunity for citizen participation).

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§ 87. Distinctions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1063

Watercourses are to be distinguished from surface waters,¹ which do not have an identity and existence as a stream or body of water,² and also from natural drainage channels,³ drainage ditches,⁴ or surface drainage.⁵ Watercourses and drains differ chiefly in that the water in a natural watercourse flows as a well-defined stream.⁶ However, the fact that streams with clearly visible channels and well-defined banks temporarily flatten out and flow sluggishly does not reduce them to the class of surface water.⁷ Furthermore, what starts as surface water may become a natural watercourse.⁸

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Footnotes

- 1 [Long v. IVC Indus. Coatings, Inc.](#), 908 N.E.2d 697 (Ind. Ct. App. 2009).
- 2 [§ 189](#).
- 3 [Duckworth v. Williams](#), 238 Ark. 1001, 386 S.W.2d 234 (1965); [Collins v. Wickland](#), 251 Minn. 419, 88 N.W.2d 83 (1958).
- 4 [Gienger v. Department of State Lands](#), 230 Or. App. 178, 214 P.3d 75 (2009) (creek was a natural stream and not a drainage ditch).
- 5 [Bilo v. El Dorado Broadcasting Co.](#), 101 Ark. App. 267, 275 S.W.3d 660 (2008).
- 6 [Collins v. Wickland](#), 251 Minn. 419, 88 N.W.2d 83 (1958).
- 7 [Turner v. Smith](#), 217 Ark. 441, 231 S.W.2d 110 (1950).
- 8 [§ 90](#).

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III. Particular Types of Waters or Water Bodies


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§ 88. Effect of artificial improvements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1063, 1068

Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of a stream, do not affect its status as a natural watercourse.¹ A slough may be a "natural, perennial-flowing stream" where, despite artificial alterations, it flows continuously through significant portions of a historic channel and includes waters exceeding what are necessary to serve seasonal irrigation rights and other beneficial uses.²

Under some circumstances, an artificial ditch may become a natural watercourse by lapse of time.³ On the other hand, a manmade ditch is not a "statutory watercourse" where the ditch does not appear to have a direct continuous outlet to a stream of water or river or brook.⁴

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Footnotes

- ¹ [Locklin v. City of Lafayette](#), 7 Cal. 4th 327, 27 Cal. Rptr. 2d 613, 867 P.2d 724 (1994).
A natural stream or watercourse does not lose its natural character merely by artificial improvements.
[Northport Irr. Dist. v. Jess](#), 215 Neb. 152, 337 N.W.2d 733 (1983).
- ² [Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.](#), 2008 MT 377, 346 Mont. 507, 198 P.3d 219 (2008).
- ³ [Gannon v. Rumbaugh](#), 772 N.W.2d 258 (Iowa Ct. App. 2009).
- ⁴ [Gruber v. County of Dawson](#), 232 Neb. 1, 439 N.W.2d 446 (1989).

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1. In General

§ 89. Channel, bed, and banks

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1066

As ordinarily defined, a watercourse must have a channel with a bed and banks¹ although this criterion is not exclusive.² There must be a channel, a bed to the stream, and not merely low land over which the water flows although it is not material what the width or depth may be.³ Accordingly, diffuse and intermittent flow of water over lowlands does not qualify as a public watercourse.⁴ Other decisions consider these views too narrow, it being declared that a watercourse is the condition created by a stream of water having a well-defined and substantial existence and that if this substantial existence is present, the fact that the stream is not strong enough to create a bed and banks is not sufficient to defeat its character as a watercourse.⁵ It has also been said that no particular fact is immediately conclusive when determining whether a particular body of water is a watercourse, including whether the watercourse has a defined bed and banks⁶ and that the bed and banks can be slight, imperceptible, or absent in some circumstances.⁷ A stream does not necessarily cease to be a watercourse by spreading over low land before flowing again in a natural channel.⁸

The prevailing view is that gullies, ravines, swales, sloughs, swamps, and similar depressions are not watercourses⁹ although they have been held to be such in several instances.¹⁰

A "natural watercourse" has long been defined to include the flood channel of a stream because the flood channel is as much a natural part of the stream as is the ordinary channel.¹¹

Footnotes

- 1 § 86.
- 2 Long v. IVC Indus. Coatings, Inc., 908 N.E.2d 697 (Ind. Ct. App. 2009).
- 3 Turner v. Smith, 217 Ark. 441, 231 S.W.2d 110 (1950); Doney v. Beatty, 124 Mont. 41, 220 P.2d 77 (1950).
- 4 Skoumbas v. City of Orinda, 165 Cal. App. 4th 783, 81 Cal. Rptr. 3d 242 (1st Dist. 2008) (instead, is surface water); Caldwell v. Goldberg, 43 Ohio St. 2d 48, 72 Ohio Op. 2d 28, 330 N.E.2d 694 (1975).
- 5 Stouder v. Dashner, 242 Iowa 1340, 49 N.W.2d 859 (1951); State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935).
- 6 Town of Avon v. West Central Conservancy Dist., 957 N.E.2d 598 (Ind. 2011).
- 7 Edwards Aquifer Authority v. Day, 274 S.W.3d 742 (Tex. App. San Antonio 2008), judgment aff'd, 369 S.W.3d 814 (Tex. 2012).
- 8 Wellman v. Kelley, 197 Or. 553, 252 P.2d 816 (1953).
- 9 Happy v. Kenton, 362 Mo. 1156, 247 S.W.2d 698 (1952).
- 10 City of Globe v. Shute, 22 Ariz. 280, 196 P. 1024 (1921) (ravine or wash); Jaquez Ditch Co. v. Garcia, 17 N.M. 160, 124 P. 891 (1912) (ravine).
- 11 Fitzpatrick v. Okanogan County, 169 Wash. 2d 598, 238 P.3d 1129 (2010).

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A. Natural Watercourses

1. In General

§ 90. Source of water

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1069

The term "running water" in the definition of a watercourse implies a source that furnishes the water.¹ Such a source must have a well-defined existence.²

The source of a watercourse may be surface water alone, or springs.³ While it has been stated in some cases that to constitute a watercourse, the source of supply must be more permanent than mere surface water,⁴ it is not permissible to conclude that a watercourse does not exist merely because the source is what is known as "surface water."⁵ The question is not determined only from the origin of the water, for streams may be composed wholly of surface water or water that falls in the form of rain or snow.⁶ Surface water becomes a natural watercourse at the point where it begins to form or converges into a reasonably well-defined channel although the stream itself may be very small and the water may not flow continuously.⁷ So, while the term "watercourse" does not ordinarily include water descending from hills down hollows and ravines only in times of rain and melting snow, it does once that water flows down into a well defined channel, through which it has flowed from time immemorial.⁸ The source of a watercourse, it is said, is immaterial provided that the supply is permanent or at least periodic.⁹

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Footnotes

¹ § 86.

² [In re Johnson Creek Water Rights](#), 159 Wash. 629, 294 P. 566 (1930).

Water that has a definite source and takes a definite channel is a watercourse. [Snyder v. Platte Valley Public Power and Irrigation Dist.](#), 144 Neb. 308, 13 N.W.2d 160, 160 A.L.R. 1154 (1944).
3 [Johnson v. Board of County Com'rs of Pratt County](#), 259 Kan. 305, 913 P.2d 119 (1996).
4 [Sheffet v. County of Los Angeles](#), 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (2d Dist. 1970); [Klokkenga v. Carolan](#),
200 S.W.3d 144 (Mo. Ct. App. W.D. 2006).
5 [International-Great Northern R. Co. v. Reagan](#), 121 Tex. 233, 49 S.W.2d 414 (1932).
6 [Johnson v. Williams](#), 238 S.C. 623, 121 S.E.2d 223 (1961).
7 [Sheffet v. County of Los Angeles](#), 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (2d Dist. 1970); [Sieck v. Godsey](#),
254 Iowa 624, 118 N.W.2d 555 (1962) (holding that a swale was a natural watercourse); [Withers v. Berea](#)
[College](#), 349 S.W.2d 357 (Ky. 1961); [Johnson v. Williams](#), 238 S.C. 623, 121 S.E.2d 223 (1961).
8 [Withers v. Berea College](#), 349 S.W.2d 357 (Ky. 1961).
9 [Wellman v. Kelley](#), 197 Or. 553, 252 P.2d 816 (1953).

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III. Particular Types of Waters or Water Bodies

A. Natural Watercourses

1. In General

§ 91. Current; permanency, continuity, and uniformity of flow

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1065

To constitute a watercourse, the stream or flow must have a substantial element or degree of permanence and continuity.¹ A watercourse exists if the surface water uniformly or habitually flows over a given course having reasonable limits on its width.² However, a stream need not flow continually, but may at times be dry, provided that it has a well-defined and substantial existence, or, as it is sometimes said, a usual or frequent flow that occurs regularly at certain seasons, and on which dependence may be placed, distinguished from an irregular one.³ Accordingly, for a watercourse to exist, there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel, and these conditions must reoccur with some degree of regularity.⁴ However, even an intermittent flow may be sufficient to establish a watercourse.⁵ The water need not necessarily flow continually but at least from time immemorial and for a substantial period of each year.⁶

The length of time that a stream has existed or has flowed in a particular channel is not necessarily determinative of its character or status as a watercourse.⁷ However, a creek is no longer a watercourse, where the flow below a dam has ceased, and parts of the bed have been filled.⁸

A moving current is one of the pronounced characteristics of a watercourse⁹ and has been stated to be essential.¹⁰ However, it has also been said that the current does not need to be continuous, and there may even be long periods where the channel is dry.¹¹ The fact that a body of water is self-contained, and so the water lacks internal movement, does not necessarily mean the water is not contained within a watercourse.¹²

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Footnotes

- 1 [Collins v. Wickland](#), 251 Minn. 419, 88 N.W.2d 83 (1958).
- 2 [Gannon v. Rumbaugh](#), 772 N.W.2d 258 (Iowa Ct. App. 2009).
- 3 [Northport Irr. Dist. v. Jess](#), 215 Neb. 152, 337 N.W.2d 733 (1983).
A natural watercourse is a channel, having a bed and banks, and a current in which the waters, with some regularity, run in a certain direction. [King County v. Boeing Co.](#), 62 Wash. 2d 545, 384 P.2d 122 (1963).
- 4 [Northport Irr. Dist. v. Jess](#), 215 Neb. 152, 337 N.W.2d 733 (1983).
- 5 [Edwards Aquifer Authority v. Day](#), 274 S.W.3d 742 (Tex. App. San Antonio 2008), judgment aff'd, 369 S.W.3d 814 (Tex. 2012).
- 6 [Long v. IVC Indus. Coatings, Inc.](#), 908 N.E.2d 697 (Ind. Ct. App. 2009).
- 7 [Rait v. Furrow](#), 74 Kan. 101, 85 P. 934 (1906); [Hoefs v. Short](#), 114 Tex. 501, 273 S.W. 785, 40 A.L.R. 833 (1925).
- 8 [Dayley v. City of Burley](#), 96 Idaho 101, 524 P.2d 1073 (1974).
- 9 [King County v. Boeing Co.](#), 62 Wash. 2d 545, 384 P.2d 122 (1963).
- 10 [Hoefs v. Short](#), 114 Tex. 501, 273 S.W. 785, 40 A.L.R. 833 (1925).
- 11 [Edwards Aquifer Authority v. Day](#), 274 S.W.3d 742 (Tex. App. San Antonio 2008), judgment aff'd, 369 S.W.3d 814 (Tex. 2012).
- 12 [Town of Avon v. West Central Conservancy Dist.](#), 957 N.E.2d 598 (Ind. 2011).

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III. Particular Types of Waters or Water Bodies


A. Natural Watercourses

1. In General

§ 92. Ownership

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1457

Generally, the land underlying nonnavigable streams is the subject of private ownership and is vested in the proprietors of the adjoining lands.¹ If a stream is nonnavigable, a riparian landowner's title extends to the middle of the bed² or thread³ of the stream, and a deed of the adjoining land includes the bed to the center or thread of the stream.⁴

Ordinarily, state law controls questions of the title to beds of nonnavigable lakes and streams unless the United States has expressed its intent when disposing of riparian lands.⁵

Waters of a state may be a "public asset" that may not constitutionally be appropriated by initiative; the state has a property-like interest in the waters based on its public trust responsibilities and because the waters provide a source of revenue, such as through fishing.⁶

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Footnotes

- 1 [People v. Emmert](#), 198 Colo. 137, 597 P.2d 1025, 6 A.L.R.4th 1016 (1979); [Orr v. Mortvedt](#), 735 N.W.2d 610 (Iowa 2007).
As to navigable rivers, see § 147.
- 2 [State ex rel. Meek v. Hays](#), 246 Kan. 99, 785 P.2d 1356 (1990).
- 3 [Hanes v. State](#), 1998 OK CR 74, 973 P.2d 330 (Okla. Crim. App. 1998), as corrected, (Feb. 22, 1999).
- 4 [More v. Johnson](#), 193 Colo. 489, 568 P.2d 437 (1977); [Belmont v. Umpqua Sand & Gravel, Inc.](#), 273 Or. 581, 542 P.2d 884 (1975).

Riparian rights are generally discussed in §§ 33 et seq.

5 Yankton Sioux Tribe of Indians v. Nelson, 683 F.2d 1160 (8th Cir. 1982).

6 Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell, 215 P.3d 1064 (Alaska 2009).

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2. Interference with Stream or Flow

a. In General

§ 93. Right to natural flow

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1233

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 83](#) (Finding of fact—Destruction of natural stream by wells)

A riparian proprietor has the right to have the water of a stream flow by or through the proprietor's premises in its natural mode, course, and volume.¹ A riparian owner has a property interest in the flow of a natural watercourse through or adjacent to the owner's property.² There is a natural right to enjoy this flow without disturbance, interference, or material diminution by any other proprietor.³ However, this right is subject to the right of other proprietors to make reasonable use of the water.⁴ Thus, each proprietor may make any use of the water flowing over one's premises that does not essentially or materially diminish the quantity, affect the quality, or detain it so as to deprive other proprietors or the public of fair and reasonable participation in the water's benefits.⁵

The natural state of a stream is the condition of the stream under the ordinary operation of the physical laws that affect it although this may differ at different seasons of the year.⁶

Footnotes

- 1 § 55.
- 2 Coastal Plains Utilities, Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915 (2004); Snyder v. Callaghan, 168 W. Va. 265, 284 S.E.2d 241 (1981) (holding modified on other grounds by, *Affiliated Const. Trades Foundation v. West Virginia Dept. of Transp.*, 227 W. Va. 653, 713 S.E.2d 809 (2011)).
- 3 In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 4 Coastal Plains Utilities, Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915 (2004).
- 5 In re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 6 In re Lake Seymour, 117 Vt. 367, 91 A.2d 813 (1952).

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2. Interference with Stream or Flow

a. In General

§ 94. Change of course or channel

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  [1312 to 1322, 1385 to 1388](#)

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 264](#) (Complaint, petition, or declaration—Obstruction of natural drainage—By change in natural flow of stream)

A landowner may divert or change the course of a stream flowing through one's land¹ provided that the landowner returns it to its original or natural channel before it reaches the land of the lower owner.² However, there is a limitation to the general principle that a property owner may use one's land as the owner pleases for all lawful purposes, preventing a landowner from drastically altering the flow of a watercourse.³ A riparian owner of lands abutting a stream does not have the right to place obstructions into the stream for the purpose of changing the natural course of the river or for any other purpose that would do damage to other riparian owners.⁴ Accordingly, a landowner may not divert the flow of a watercourse to the exclusion of others⁵ or the injury of a neighbor.⁶ An obstruction or diversion of a natural watercourse, even without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage.⁷

A party who alters the natural flow of water must do so in a manner that is not negligent⁸ or with due care to provide the stream with a new channel of sufficient capacity.⁹

CUMULATIVE SUPPLEMENT

Cases:

Water court's factual finding that river from which mutual reservoir company diverted water and the closed basin into which water was delivered were unconnected stream systems was not clearly erroneous, in proceeding concerning company's change-of-use application, where there was a hydraulic divide between river and closed basin. [Santa Maria Reservoir Company v. Warner](#), 2020 CO 27, 461 P.3d 478 (Colo. 2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Diedrich v. Farnsworth](#), 3 Ariz. App. 264, 413 P.2d 774 (1966); [McCausland v. Jarrell](#), 136 W. Va. 569, 68 S.E.2d 729 (1951).
- 2 [Costley v. Long](#), 112 Ga. App. 758, 146 S.E.2d 153 (1965).
- 3 [Maddocks v. Giles](#), 686 A.2d 1069 (Me. 1996).
- 4 [Campion v. Simpson](#), 104 Idaho 413, 659 P.2d 766 (1983).
- 5 [Edmondson v. Edwards](#), 111 S.W.3d 906 (Mo. Ct. App. S.D. 2003).
- 6 [Maddocks v. Giles](#), 1999 ME 63, 728 A.2d 150 (Me. 1999); [Bristol v. Rasmussen](#), 249 Neb. 854, 547 N.W.2d 120 (1996) (upper proprietor).
- 7 [In re Flood Litigation](#), 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 8 [A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County](#), 222 Ariz. 515, 217 P.3d 1220 (Ct. App. Div. 1, 2009).
- 9 [Harper v. Johannesen](#), 84 Idaho 278, 371 P.2d 842 (1962); [McCausland v. Jarrell](#), 136 W. Va. 569, 68 S.E.2d 729 (1951).
A landowner may not divert the natural waters of a stream in such a manner that these waters, combined with floodwaters, cause damage to a neighbor. [Diedrich v. Farnsworth](#), 3 Ariz. App. 264, 413 P.2d 774 (1966).

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III. Particular Types of Waters or Water Bodies

A. Natural Watercourses


2. Interference with Stream or Flow

a. In General

§ 95. Acceleration of flow or increase in volume

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1426

An upper riparian proprietor does not ordinarily have a right, without permission, express or implied, to accelerate the flow or current of a natural watercourse or to increase its volume, to the injury of a lower proprietor.¹ However, the view has also been taken that a riparian proprietor has the right, without liability for injuries incidentally resulting to other proprietors, to accelerate the flow or increase the volume of the stream by such alterations of or improvements in the channel as are reasonably necessary for the utilization and enjoyment of the proprietor's rights in the stream or to protect the proprietor's property.² Thus, an upper riparian proprietor does not have the right suddenly to release water held back by an ice jam, to the injury of a lower owner, and the fact that such action is necessary to protect the land or other property of the upper owner does not relieve the landowner from liability.³

The right to construct and maintain dams, dikes, embankments, or other structures in or along watercourses to facilitate their use is generally subject to the paramount right of riparian proprietors to have the stream flow in its natural manner, without undue acceleration or increase in volume.⁴ Thus, a riparian proprietor may not unreasonably interfere with the natural flow of a stream by sending down a great deal more than the usual quantity of water from a dam at times and by so doing leave none for a long time afterward to maintain the stream in its usual condition.⁵

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Footnotes

¹ [Lamb v. Dade County](#), 159 So. 2d 477 (Fla. 3d DCA 1964).

- 2 San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200 (1920).
3 Niccum v. Atchison, T. & S.F. Ry. Co., 147 Kan. 645, 78 P.2d 1 (1938).
4 Niccum v. Atchison, T. & S.F. Ry. Co., 147 Kan. 645, 78 P.2d 1 (1938); Winchester Water Works Co. v.
Holliday, 241 Ky. 762, 45 S.W.2d 9 (1931).
As to obstruction or detention by a dam, generally, see § 99.
5 Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 24 N.E. 774 (1890).

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A. Natural Watercourses

2. Interference with Stream or Flow

a. In General

§ 96. Restoration to original channel or condition

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1323

It is generally held that a riparian owner may restore a stream that has formed a new channel on the owner's land to its former channel provided the owner does so within a reasonable time after the new channel is formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected.¹ Moreover, a riparian owner may turn the waters of such a stream back from the new to the old channel, without being required first to clean out the old channel to restore it to the depth and condition it was in before the stream changed its course.² However, the channel may not be restored if the other owners have made improvements to cope with the diversion.³

A riparian landowner's rights to construct necessary embankments, dikes, or other structures to keep a river bank in its original position, restore the banks to a prior condition, or bring a stream back into its natural course when it has encroached on the owner's land are not absolute, and only property owners taking actions to maintain the status quo of a flowing river or property it bounds are held blameless.⁴

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Footnotes

- ¹ [Whipple v. Nelson](#), 143 Neb. 286, 9 N.W.2d 288 (1943).
As to the restoration of the natural condition of a stream by the discontinuance of a diversion of water from it, see [§ 67](#).
- ² [Yazoo & M.V.R. Co. v. Brown](#), 99 Miss. 88, 54 So. 804 (1911).

3 [Johnk v. Union Pac. R. Co., 99 Neb. 763, 157 N.W. 918 \(1916\).](#)

4 [Smicklas v. Spitz, 1992 OK 145, 846 P.2d 362 \(Okla. 1992\).](#)

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b. Obstruction and Detention

(1) Overview

§ 97. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1312, 1313

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 208](#) (Complaint, petition, or declaration—Deflection of current of natural stream by adjacent landowner)

Without the consent of the other proprietors who may be affected by an upper proprietor's operations, an upper proprietor does not have the right to interrupt or retard the natural flow of the water unreasonably, to the injury of lower owners,¹ nor has a lower proprietor the right to throw the water back on the land of an upstream proprietor² unless the person has acquired the right to do so by prior appropriation³ or the exercise of the power of eminent domain.⁴ On the other hand, downstream landowners do not have an affirmative duty to an upstream owner to maintain the downstream watercourse by removing naturally growing vegetation to facilitate the flow of water off the upstream property.⁵

The floodplain of a stream is considered a part of the channel of the stream, and no one may obstruct the flow of floodwaters in natural drainage to the detriment of another.⁶

It is a continuing duty of those who build structures in a natural watercourse to provide for the passage through the obstruction of all water that may reasonably be anticipated to flow in the stream.⁷ Obstruction of the natural flow of a stream is always done at the risk of being answerable in damages to a person who sustains a loss as a result.⁸

Observation:

There may be a statutory prohibition on obstructing a stream.⁹

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Footnotes

- 1 [Weeks v. McKay](#), 85 Idaho 617, 382 P.2d 788 (1963); [Wellman v. Kelley](#), 197 Or. 553, 252 P.2d 816 (1953); [Johnson v. Williams](#), 238 S.C. 623, 121 S.E.2d 223 (1961).
- 2 [Jones v. Home Bldg. and Loan Ass'n of Thomasville](#), 252 N.C. 626, 114 S.E.2d 638 (1960); [Wellman v. Kelley](#), 197 Or. 553, 252 P.2d 816 (1953).
A downstream proprietor breached the proprietor's duty to upstream owners by negligently obstructing the creek through the installation of a culvert across the creek. [Bristol v. Rasmussen](#), 249 Neb. 854, 547 N.W.2d 120 (1996).
- 3 [§§ 355 et seq.](#)
- 4 [Am. Jur. 2d, Eminent Domain §§ 181 et seq.](#)
- 5 [Buchholz v. Barnes County Water Bd.](#), 2008 ND 158, 755 N.W.2d 472 (N.D. 2008) (under a statute).
- 6 [Giger v. City of Omaha](#), 232 Neb. 676, 442 N.W.2d 182 (1989).
- 7 [Bristol v. Rasmussen](#), 249 Neb. 854, 547 N.W.2d 120 (1996).
- 8 [Weeks v. McKay](#), 85 Idaho 617, 382 P.2d 788 (1963); [Wellman v. Kelley](#), 197 Or. 553, 252 P.2d 816 (1953).
- 9 [Frank v. Kansas Dept. of Agriculture, Div. of Water Resources](#), 40 Kan. App. 2d 1024, 198 P.3d 195 (2008) (construing implementing regulations); [Georgia Pacific Corp. v. Armstrong](#), 451 So. 2d 201 (Miss. 1984) (cutting or depositing of trees in excess of six inches in diameter into a running stream).

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(1) Overview

§ 98. Joint or several liability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1322

Under the general rule that each person who acts in maintaining a nuisance is liable for the resulting damage, but a person who acts independently is liable for the damages that result only from the person's own act,¹ persons who independently, and not jointly and in concert, place obstructions in a watercourse are not jointly liable for injury resulting from the obstructions taken as a whole, but each is liable only for the damage traceable to the person's own wrongful act since those persons are not joint wrongdoers in the sense that they join in doing the same wrongful act but only in the sense that their several wrongful acts combine in causing the total damage.² In such a case, a plaintiff is not required to prove the precise damage inflicted by a single defendant but may prove the proportionate extent to which the defendant contributed to the plaintiff's injury, and the jury may award such proportion of the damages as is commensurate with the defendant's contribution.³

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Footnotes

- ¹ Am. Jur. 2d, Nuisance § 225.
- ² [Weck v. Los Angeles County Flood Control Dist.](#), 104 Cal. App. 2d 599, 232 P.2d 293 (2d Dist. 1951).
- ³ [Wm. Tackaberry Co. v. Sioux City Service Co.](#), 154 Iowa 358, 132 N.W. 945 (1911).

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(2) Dams

§ 99. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1319

Trial Strategy

[Dam Failure as Result of Negligent Design or Maintenance](#), 19 Am. Jur. Proof of Facts 2d 75

[Failure to Manage Dam or Reservoir to Prevent Flooding](#), 17 Am. Jur. Proof of Facts 2d 133

Forms

[Am. Jur. Legal Forms 2d § 260:72](#) (Provision in deed—Reserving right to erect dam)

[Am. Jur. Legal Forms 2d § 260:73](#) (Grant of easement to flood land by construction of dam)

[Am. Jur. Legal Forms 2d § 260:74](#) (License agreement between riparian owners to allow construction of dam and floodgate)

Subject to public regulation in proper cases,¹ a dam may be constructed and maintained across a stream by a riparian proprietor, or by another with proper authority, provided that the person does not appreciably diminish the amount of water that should naturally flow onto or by the land of lower proprietors, or materially affect the continuity of the flow,² or wrongfully throw the water on the land of upper proprietors.³ Liability may be incurred by the erection and maintenance of a dam that will result in the overflow or flooding of the land or other property of other persons, without having acquired a right to do so.⁴ The mere fact that an injury results to other riparian owners from the construction and use of a dam is not decisive, however, on the question whether such use is permissible.⁵ The critical question with regard to erosion is whether the specific erosion due to the operation of a dam was reasonably necessary, and, if so, the erosion is within flood easements.⁶

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Footnotes

- 1 §§ 172 et seq.
- 2 *Brummund v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969) (disapproved of on other grounds by, *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007)).
As to waters impounded by dams as artificial bodies of water, see §§ 266 et seq.
- 3 *Humphreys-Mexia Co. v. Arseneaux*, 116 Tex. 603, 297 S.W. 225, 53 A.L.R. 1147 (1927).
- 4 *Henry Ford & Son v. Little Falls Fibre Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483 (1930).
As to liability for the flooding of land, generally, see §§ 395 et seq.
- 5 *Gehlen v. Knorr*, 101 Iowa 700, 70 N.W. 757 (1897).
Based on the rule that compensation is required for a practical destruction or material impairment of the value of an owner's lands, but it is otherwise where the owner is merely put to some extra expense in warding off the consequences of the overflow, a riparian owner who was obliged to raise his dikes to prevent the backing up of water from a dam built under legislative authority to reclaim swamp and overflowed lands may not recover. *Manigault v. Springs*, 199 U.S. 473, 26 S. Ct. 127, 50 L. Ed. 274 (1905).
- 6 *Mattson v. Montana Power Co.*, 2012 MT 318, 368 Mont. 1, 291 P.3d 1209 (2012).

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(2) Dams

§ 100. Effect of public authorization and regulation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1319

Legislative or other public authorization to erect and maintain a dam will not ordinarily be construed to authorize the ponding of water on the land of upper riparian owners.¹ A finding as required by statute, before issuance of a license to construct a dam, that it was reasonable and for public benefit, does not necessarily show that the subsequent use of the dam is reasonable with respect to the rights of the owner of flooded land, who was not a party to the licensing proceeding.²

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Footnotes

- ¹ [Henry Ford & Son v. Little Falls Fibre Co.](#), 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483 (1930) (license by Federal Power Commission not a defense to injury to another by the erection and maintenance of a dam); [Humphreys-Mexia Co. v. Arseneaux](#), 116 Tex. 603, 297 S.W. 225, 53 A.L.R. 1147 (1927).
- ² [Healey v. Citizens' Gas & Elec. Co.](#), 199 Iowa 82, 201 N.W. 118, 38 A.L.R. 1226 (1924).

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(2) Dams

§ 101. Effect of easement or prescriptive rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1319

A.L.R. Library

[Loss of private easement by nonuse, 62 A.L.R.5th 219](#)

[Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common, 55 A.L.R.2d 554](#)

Under the general rule that an easement created by a deed is not lost by nonuse alone, the right to maintain a dam in a stream will continue indefinitely unless extinguished by positive acts of abandonment or by adverse interference for the necessary period.¹

It is generally held that as against other riparian proprietors, the right to maintain a dam may be acquired by adverse use where the usual requirements of a prescriptive right² are satisfied.³ The right acquired by prescription may be lost by abandonment.⁴

A prescriptive right to pond backwater is not obtained where the accumulation of the water is a public nuisance.⁵ Also, a dam should not be allowed where it interferes with public rights of navigation or fail to provide for suitable fishways.⁶

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Footnotes

- 1 [Haigh v. Lenfesty](#), 239 Ill. 227, 87 N.E. 962 (1909); [Percival v. Williams](#), 82 Vt. 531, 74 A. 321 (1909).
- 2 [As to requirements with regard to prescription, generally, see §§ 384 et seq.](#)
- 3 [Goodrich v. McMillan](#), 217 Mich. 630, 187 N.W. 368, 26 A.L.R. 801 (1922); [Diking Dist. No. 2 of Pend Oreille County v. Calispel Duck Club](#), 11 Wash. 2d 131, 118 P.2d 780 (1941).
[As to a prescriptive right to flow lands, see §§ 273, 274.](#)
- 4 [Davenport v. Town of Danvers](#), 336 Mass. 106, 142 N.E.2d 753 (1957).
- 5 [Charnley v. Shawano Water-Power & River-Improvement Co.](#), 109 Wis. 563, 85 N.W. 507 (1901).
- 6 [Hazen v. Perkins](#), 92 Vt. 414, 105 A. 249, 23 A.L.R. 748 (1918).

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(2) Dams

§ 102. Loss of water by evaporation, absorption, or seepage as affecting propriety

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1319

The mere fact that there is an appreciable loss due to evaporation, absorption, or seepage does not render the maintenance of a dam wrongful if, considering the size of the stream, that loss is reasonable.¹ However, an upper owner is not making a reasonable use of the stream and therefore incurs liability where that owner erects a dam the maintenance of which will virtually amount, through the resulting evaporation or percolation, to drying up the stream, to the injury of lower owners.²

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Footnotes

¹ [Preston v. Clark](#), 238 Mich. 632, 214 N.W. 226, 53 A.L.R. 194 (1927).

² [Cozy Lake v. Nyoda Girls' Camp](#), 99 N.J. Eq. 384, 131 A. 892 (Ct. Err. & App. 1926).

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(3) Other Obstructions

§ 103. Debris

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1317

A.L.R. Library

[Liability of person obstructing stream, ravine, or similar area by debris or waste, for damages caused by flooding or the like, 29 A.L.R.2d 447](#)

Liability for the obstruction of a stream by debris or drift may arise from placing or leaving such debris in or along the stream,¹ or from the erection and maintenance of structures causing an accumulation of debris or drift.²

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Footnotes

- ¹ [Cooper v. Sharon Springs Cent. School Dist.](#), 8 A.D.3d 734, 777 N.Y.S.2d 564 (3d Dep't 2004); [Johnson v. Sultan Ry. & Timber Co.](#), 145 Wash. 106, 258 P. 1033, 54 A.L.R. 356 (1927).
As to the liability of a person obstructing a stream by debris or waste, for damages caused by flooding or the like, see [§ 396](#).

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(3) Other Obstructions

§ 104. Structures

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1317, 1318

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 66](#) (Complaint, petition, or declaration—For damages and injunctive relief—Obstruction and diversion of stream by levee)

Structures may not be built or maintained that will change the channel of a stream or project water against or on the property of another in such a way as will result in substantial injury to other owners' property,¹ and an abutting landowner who does so is liable to the other landowner for the damage caused.² Maintaining a structure that causes recurrent flooding may constitute a nuisance.³ On the other hand, construction of a pier does not interfere with a neighbor's rights where the neighbor does not show that this deprived the neighbor of reasonable access to the water.⁴

The legality of dikes depends on the law in effect at the time the dikes were constructed.⁵

Footnotes

- 1 Johnson v. Board of County Com'rs of Pratt County, 259 Kan. 305, 913 P.2d 119 (1996).
- 2 [Campion v. Simpson](#), 104 Idaho 413, 659 P.2d 766 (1983); [Williams v. Columbus Producing Co.](#), 80 W. Va. 683, 93 S.E. 809 (1917).
- 3 Johnson v. Board of County Com'rs of Pratt County, 259 Kan. 305, 913 P.2d 119 (1996).
- 4 [Schuss v. Palmisano](#), 51 A.D.3d 766, 857 N.Y.S.2d 709 (2d Dep't 2008).
- 5 [Miller v. Walsh County Water Resource Dist.](#), 2012 ND 152, 819 N.W.2d 526 (N.D. 2012).

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(3) Other Obstructions

§ 105. Power reservoirs

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1314, 1317

A.L.R. Library

[Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065](#)

Water flowing in a natural watercourse may be detained for the development and utilization of power.¹ However, liability may be imposed if such a use is unreasonable.²

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Footnotes

- ¹ [Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California](#), 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930) (temporary detention reservoirs allowed); [Hazard Powder Co. v. Somersville Mfg. Co.](#), 78 Conn. 171, 61 A. 519 (1905); [Price v. High Shoals Mfg. Co.](#), 132 Ga. 246, 64 S.E. 87 (1909).
- ² [Price v. High Shoals Mfg. Co.](#), 132 Ga. 246, 64 S.E. 87 (1909).

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(4) Standard of Care

§ 106. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1314, 1321

Forms

[Am. Jur. Legal Forms 2d § 260:83](#) (Provision in construction contract—Protection of streams and adjacent areas)

One who obstructs a watercourse by a dam, embankment, or other structure must use reasonable care and skill in constructing and maintaining it, to prevent injury to upstream or downstream lands, but the person is not responsible for inevitable accidents or for injuries occasioned by causes that could not reasonably be anticipated or prevented.¹ Similarly, liability may be imposed for negligently permitting such a quantity of debris to enter a watercourse that it causes damage to a downstream owner.²

An upstream owner and an operator of a dam and sluice gate did not negligently cause sediment to be deposited into a pond downstream of a dam where sediment flowed through a lake naturally and fell to the bottom of the lake before reaching the dam separating the lake from a tributary leading to the pond.³

Footnotes

- 1 Letterman v. English Mica Co., 249 N.C. 769, 107 S.E.2d 753 (1959); Carolina, C. & O. R. Co. v. Mullins, 207 Va. 207, 148 S.E.2d 752 (1966).
- 2 Cooper v. Sharon Springs Cent. School Dist., 8 A.D.3d 734, 777 N.Y.S.2d 564 (3d Dep't 2004).
- 3 Zarlin v. Town of Clarkstown, 102 A.D.3d 865, 958 N.Y.S.2d 464 (2d Dep't 2013).

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(4) Standard of Care

§ 107. Flooding

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1314, 1318, 1321

The general rule is that one who obstructs a natural watercourse or places a structure in it, even in the exercise of a lawful right to do so, must take proper precautions to prevent injury to others by the action of anticipatable floods.¹ However, one is not obligated to anticipate an unprecedented flood.² For the latter rule to apply, there is some authority that the act of God resulting in the flood must not only be the proximate cause but the sole cause of the injury,³ and if the flood is so overwhelming and destructive as to produce the injury, regardless of whether the defendant has been negligent, the defendant's negligence is not the proximate cause of the injury.⁴ However, it has also been held that the defendant has the burden to show by clear and convincing evidence the character and measure of damages that was solely the result of the unforeseeable event and in no way fairly attributable to the defendant's conduct; otherwise, the defendant is liable for the entire amount of damage.⁵ Also if, after the original construction of an obstruction and prior to the flood in question, other floods of a previously unprecedented character occur, demonstrating the faulty construction or the inadequacy of the waterway left by the obstruction, a new standard of obligation is created and the duty arises to meet the new conditions thus established.⁶

Some courts recognize that strict liability applies to construction of an obstruction that results in the overflow of a natural watercourse since liability is based on trespass.⁷

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Footnotes

- 1 [Goble v. Louisville & N. R. Co.](#), 187 Ga. 243, 200 S.E. 259 (1938); [Van Wilgen v. Albert Lea Farms Co.](#), 176 Minn. 339, 223 N.W. 301 (1929); [Crummel v. Nemaha County](#), 118 Neb. 355, 224 N.W. 864 (1929).
- 2 [Kennedy v. Union Elec. Co. of Mo.](#), 358 Mo. 504, 216 S.W.2d 756 (1948); [Peel v. Chicago, M., St. P. & P.R. Co.](#), 94 Mont. 334, 22 P.2d 617 (1933).
As to the character of flood as ordinary, extraordinary, or an act of God, see [§ 288](#).
- 3 [Tope v. King County](#), 189 Wash. 463, 65 P.2d 1283 (1937).
- 4 [Kennedy v. Union Elec. Co. of Mo.](#), 358 Mo. 504, 216 S.W.2d 756 (1948).
- 5 [In re Flood Litigation](#), 216 W. Va. 534, 607 S.E.2d 863 (2004).
Generally, as to the effect of negligence concurring with an act of God, see [Am. Jur. 2d, Negligence § 533](#).
- 6 [Mitchell v. Virginian Ry. Co.](#), 116 W. Va. 739, 183 S.E. 35 (1935).
- 7 [Klokkenga v. Carolan](#), 200 S.W.3d 144 (Mo. Ct. App. W.D. 2006).

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§ 108. Bridges

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1320

One constructing and maintaining a bridge over a stream must exercise ordinary care to provide for the flow of water in the stream and, for a failure to do so, may be liable in damages.¹ One constructing a bridge must maintain an opening for the natural flow of the water, sufficient to afford an outlet for all of the water that might reasonably be expected to flow, and accommodate such usual and ordinary floods as might reasonably be expected.² This duty does not extend to extraordinary or unprecedented floods,³ but if there is reason to anticipate that the stream will at times overflow its banks, the proprietor must also, if practicable, provide an outlet for the floodwater.⁴

One must observe both the duty to maintain adequate bridges and the duty not to cause substantial injury to downstream property owners.⁵ A contractor that designs a bridge for a county to replace an existing bridge undertakes the duty that the county owes to downstream property owners to avoid causing substantial injury to downstream property.⁶

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Footnotes

- 1 [Corrington v. Kalicak](#), 319 S.W.2d 888 (Mo. Ct. App. 1959); [Lytle v. Pennsylvania R. Co.](#), 91 Ohio App. 232, 48 Ohio Op. 341, 108 N.E.2d 72 (9th Dist. Wayne County 1951).

- 2 Corrington v. Kalicak, 319 S.W.2d 888 (Mo. Ct. App. 1959); Lytle v. Pennsylvania R. Co., 91 Ohio App.
232, 48 Ohio Op. 341, 108 N.E.2d 72 (9th Dist. Wayne County 1951).
- 3 Lytle v. Pennsylvania R. Co., 91 Ohio App. 232, 48 Ohio Op. 341, 108 N.E.2d 72 (9th Dist. Wayne County
1951).
- 4 Broadway Mfg. Co. v. Leavenworth Terminal Ry. & Bridge Co., 81 Kan. 616, 106 P. 1034 (1910).
- 5 Johnson v. Board of County Com'rs of Pratt County, 259 Kan. 305, 913 P.2d 119 (1996).
- 6 Johnson v. Board of County Com'rs of Pratt County, 259 Kan. 305, 913 P.2d 119 (1996).

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§ 109. Generally

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1325

Judicial relief is available if a riparian landowner obstructs the flow of a stream or watercourse, thereby causing a neighbor's lands to flood.¹ While an administrative determination of the rights of adjoining riparian landowners is required when there is a dispute regarding placement of an encroachment pursuant to a permit,² common-law claims for impairment of water rights as a result of an obstruction are not subject to the primary jurisdiction doctrine because such actions are traditionally cognizable by the courts without reference to agency expertise or discretion.³

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Footnotes

- ¹ [Georgia Pacific Corp. v. Armstrong](#), 451 So. 2d 201 (Miss. 1984) (flooding on upstream land).
A court had subject matter jurisdiction to adjudicate neighboring landowners' common-law claims involving impairment of water rights arising from an upstream landowner's construction of a dam to create a farm pond along the banks of a tributary. [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007).
- ² [Brett v. Eleventh Street Dockowner's Association, Inc.](#), 141 Idaho 517, 112 P.3d 805 (2005).
- ³ [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007).

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§ 110. Damages

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1326, 1327, 1338

A riparian owner who is injured by the obstruction or detention of the water of a stream may recover damages, temporary or permanent, or both.¹ It is not essential that the riparian owner's injury be different in kind from that suffered by other owners.²

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Footnotes

- ¹ [Georgia Pacific Corp. v. Armstrong](#), 451 So. 2d 201 (Miss. 1984).
The obstruction or diversion of the natural watercourse or the introduction into it of sediment, sludge, refuse, or other materials that corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner's property right, which may give rise to a cause of action for damages. [In re Flood Litigation](#), 216 W. Va. 534, 607 S.E.2d 863 (2004).
- ² As to remedies and actions for injuries to property by flooding and overflow, see [§§ 401 et seq.](#)
[Stimson v. Inhabitants of Brookline](#), 197 Mass. 568, 83 N.E. 893 (1908).

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§ 111. Injunction

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1326, 1327, 1339

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 76](#) (Judgment or decree—Provision—Enjoining diversion of water except for riparian uses)

An injunction may be issued where the obstruction or diversion of a natural watercourse infringes other riparian owners' property rights, and the usual requirements for an injunction are met.¹ In addition to an award of damages,² an injunction, mandatory, prohibitory, or both, may be granted as may be appropriate.³ However, where the right to injunctive relief depends on a statute, the statute should be consulted to determine whether a mandatory injunction is authorized.⁴

Injunctive relief is properly denied to a property owner who seeks to prevent an adjoining property owner from blocking drain lines and causing water to back up onto the first owner's property where the first owner not only altered the flow of surface water but also installed artificial drain lines to collect and drain both surface water and subsurface water extracted by a sump pump onto the adjacent land.⁵

A fine for contempt for failure to comply with an injunction to destroy a diversion accumulates until it is destroyed and does not stop merely when the defendant commences to destroy it.⁶

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Footnotes

- 1 [Card v. Nickerson](#), 150 Me. 89, 104 A.2d 427 (1954); [Pion v. Bean](#), 176 Vt. 1, 2003 VT 79, 833 A.2d 1248 (2003) (injunction against filling streambed that provided drainage for adjoining property); [Mullins v. Morgan](#), 176 Va. 201, 10 S.E.2d 593, 131 A.L.R. 785 (1940); [In re Flood Litigation](#), 216 W. Va. 534, 607 S.E.2d 863 (2004).
- 2 § 110.
- 3 [Georgia Pacific Corp. v. Armstrong](#), 451 So. 2d 201 (Miss. 1984).
As to mandatory injunctions, including to compel removal of obstructions to riparian rights, see [Am. Jur. 2d, Injunctions](#) § 6.
- 4 [State ex rel. Mitchell v. Ross](#), 159 Kan. 199, 152 P.2d 675 (1944).
- 5 [Len Ran, Inc. v. Mellott](#), 63 Ohio App. 3d 123, 577 N.E.2d 1185 (11th Dist. Portage County 1990).
- 6 [Edmondson v. Edwards](#), 280 S.W.3d 752 (Mo. Ct. App. S.D. 2009).

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§ 112. Nuisance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1326, 1327

A plaintiff seeking damages resulting from a watercourse obstruction that is a nuisance has the option of seeking temporary (past) damages on an abatement or permanent (past and future) damages without an abatement.¹ In addition to an action for damages, a riparian owner may maintain an action to have a dam or other structure that obstructs a stream abated if it constitutes a nuisance,² and the fact that an obstruction is of such a character that the statute of limitations has run against such an action for damages does not bar a person's independent right to maintain an action to have the nuisance abated provided it is brought within the period allowed for such actions.³

In the absence of circumstances of such character as to give rise to an estoppel, the fact that the defendant may have made substantial expenditures constructing the structure in question does not preclude its abatement or the recovery of damages.⁴

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Footnotes

- ¹ [Johnson v. Board of County Com'rs of Pratt County](#), 259 Kan. 305, 913 P.2d 119 (1996).
As to remedies for nuisances with respect to waters and water rights in general, see § 410.
- ² [McCausland v. Jarrell](#), 136 W. Va. 569, 68 S.E.2d 729 (1951).
- ³ [Priebe v. Ames](#), 104 Minn. 419, 116 N.W. 829 (1908).
Limitations are generally discussed in § 115.

4 [Mullins v. Morgan, 176 Va. 201, 10 S.E.2d 593, 131 A.L.R. 785 \(1940\).](#)

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§ 113. Measure and elements of damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1338

The damages to be recovered for the obstruction of or other interference with natural watercourses depends on the kind of action brought, that is, whether it is for temporary or permanent damages, and on the character of the injury or nuisance as temporary or permanent.¹ In actions by riparian owners for damages for injuries occasioned by interference with the flow of a stream, as in other actions for injuries to real property, the damages are, as a general rule, measured by the diminution in the market value of the property where the injury is of a permanent nature.² In the case of temporary or occasional injury, the measure of damages is the diminution in the rental value of the property, or, according to the rule in some jurisdictions, the cost of restoring the land to its former condition, when this is less than the diminution in the market value of the whole property.³ Profits shown with reasonable certainty to have been lost as the proximate result of the interference may also be recovered.⁴

If a lower riparian owner is deemed to be injured by any unlawful diversion by an upper proprietor, regardless of any actual use of the water of the stream by the lower owner and the lack of any actual damages suffered, the lower owner is entitled to at least nominal damages for the infringement of one's right.⁵

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Footnotes

- 1 Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 P.2d 146 (1961); Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965).
As to the elements, measure, and amount of damages recoverable for the overflow or flooding of land, see § 407.
- 2 Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 P.2d 146 (1961); Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965); Wilkinson v. Charles Inv. Co., 48 N.C. App. 213, 268 S.E.2d 263 (1980) (diversion resulting in a pond silting reduced the value of the plaintiff's land by the amount found by a jury).
Generally, as to damages for injury to or destruction of real property, see Am. Jur. 2d, Damages §§ 255 et seq.
- 3 Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 P.2d 146 (1961); Lauck v. Gilbert, 252 Miss. 371, 173 So. 2d 626 (1965).
- 4 Smith v. Big Lost River Irr. Dist., 83 Idaho 374, 364 P.2d 146 (1961).
- 5 Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968).

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§ 114. Duty to minimize damages

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1338

The general rule is that one whose riparian rights are affected, or whose property is flooded because of the obstruction of a natural watercourse, must exercise reasonable care to minimize the damages, and a failure to do so reduces any recovery.¹ There is, however, some authority to the effect that where one riparian proprietor continuously diminishes or detains the water in a stream unreasonably with reference to the rights of another riparian proprietor who is damaged, there is an illegal invasion of the property rights of the latter, who is not under a legal obligation to exercise ordinary care to avoid or lessen such damages.²

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Footnotes

¹ [Lauck v. Gilbert](#), 252 Miss. 371, 173 So. 2d 626 (1965).

² [Price v. High Shoals Mfg. Co.](#), 132 Ga. 246, 64 S.E. 87 (1909).

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§ 115. Time to sue and limitations; single or successive actions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1330

One seeking to prevent the unlawful obstruction of a stream by injunction must act with reasonable promptness and diligence as the right to such relief may be lost by laches.¹ In any event, the action must be brought within the time limited by the applicable statute of limitations, generally the one on injury to real property.² In this respect, the general rule is that whenever the structure or obstruction impeding the flow of water is of a permanent character, and its construction and continuing presence necessarily cause an injury, the damage is considered original, to be recovered in one action, and not continuous in character, and the statute of limitations begins to run from the completion of the obstruction or at least from the time of the first injury.³ However, when the construction and continued existence of the structure are not necessarily injurious, the compensable injury is only the damage that has happened, and there may be as many successive recoveries as there are successive injuries, in which case the statute of limitations begins to run from the occurrence of the injury forming the basis of the complaint.⁴

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Footnotes

¹ [Caminis v. Troy](#), 112 Conn. App. 546, 963 A.2d 701 (2009), judgment aff'd, 300 Conn. 297, 12 A.3d 984 (2011) (action to require removal of float and dock barred); [Mullins v. Morgan](#), 176 Va. 201, 10 S.E.2d 593, 131 A.L.R. 785 (1940).

Laches did not bar the commonwealth's action to enforce a watershed protection act against waterfront property owners, since the commonwealth sought to enforce a public right, and public authorities gave verbal

and written notice to the property owners that the work was not in compliance with the statute during the same summer in which most of the work was performed. [Com. v. Blair, 60 Mass. App. Ct. 741, 805 N.E.2d 1011 \(2004\)](#).

As to the application of the foregoing rules in the case of damage by flooding or overflow, see §§ 404 et seq. [Am. Jur. 2d, Limitation of Actions § 108](#).

2

3

4

[Henderson v. Talbott, 175 Kan. 615, 266 P.2d 273 \(1954\)](#).

[Henderson v. Talbott, 175 Kan. 615, 266 P.2d 273 \(1954\)](#).

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§ 116. Parties

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1332

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 209](#) (Complaint, petition, or declaration—Class action—Subsidence of land caused by continuing withdrawals of quantities of underground water from wells)

As a general rule, any person having a right or interest in property injured by the obstruction of or interference with a watercourse may maintain an action to recover damages sustained by that person.¹ All adjoining landowners who were suffering the alleged damages due to the slowing of water flow may be indispensable parties.²

The right of action for each recurring injury caused by interference with a stream is in the owner of the premises at the time the injury results.³ However, if the structure or condition causing the damage is of a permanent nature, and one that may be authorized, the injury is generally regarded as complete as of the time of the erection of the structure or the creation of the condition so that a subsequent grantee may not maintain an action.⁴

A suit to enjoin the maintenance of a power dam on a stream, so as to prevent water backing to the injury of another power dam on the same stream, may be sustained against anyone in possession who continues the obstruction.⁵

A government natural resources district may have a direct and legal interest sufficient to allow it to intervene in an action to adjudicate neighboring landowners' common-law claims involving impairment of water rights arising from construction of a dam for a farm pond where the district entered into an agreement with upstream landowners that provided assistance in the planning and design of the proposed farm pond and a cost-share arrangement for construction costs.⁶

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Footnotes

- 1 [Irvine v. City of Oelwein](#), 170 Iowa 653, 150 N.W. 674 (1915); [Garrett v. Beers](#), 97 Kan. 255, 155 P.2 (1916).
- 2 [Richland Parish Police Jury v. Debnam](#), 968 So. 2d 294 (La. Ct. App. 2d Cir. 2007), writ denied, 977 So. 2d 953 (La. 2008).
- 3 [City of Birmingham v. Kircus](#), 19 Ala. App. 614, 99 So. 780 (1924); [Atchison, T. & S.F. Ry. Co. v. Hadley](#), 1934 OK 336, 168 Okla. 588, 35 P.2d 463 (1934).
- 4 [Scott v. Elliott](#), 253 Or. 168, 451 P.2d 474 (1969).
- 5 [Sheffield Car Co. v. Constantine Hydraulic Co.](#), 171 Mich. 423, 137 N.W. 305 (1912).
- 6 [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007).

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§ 117. Pleading and proof

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1331, 1334

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 59](#) (Complaint, petition, or declaration—To enjoin obstruction of stream)

[Am. Jur. Pleading and Practice Forms, Waters § 61](#) (Complaint, petition, or declaration—To enjoin obstruction of lake)

[Am. Jur. Pleading and Practice Forms, Waters § 63](#) (Complaint, petition, or declaration—To enjoin actual interference with water right—Obstruction of ditch)

[Am. Jur. Pleading and Practice Forms, Waters § 66](#) (Complaint, petition, or declaration—For damages and injunctive relief—Obstruction and diversion of stream by levee)

[Am. Jur. Pleading and Practice Forms, Waters § 67](#) (Complaint, petition, or declaration—For damages and injunctive relief—Diversion of creek waters by upper riparian owner)

[Am. Jur. Pleading and Practice Forms, Waters § 69](#) (Answer—Defense—Riparian owner's use of river water for domestic purposes—River flow augmented by release of water from reservoir for use of irrigation corporation members)

[Am. Jur. Pleading and Practice Forms, Waters §§ 258 et seq.](#) (Complaints for damages for obstruction of drainage from plaintiff's land)

It is the generally accepted view that it is not necessary for a riparian owner, to maintain an action founded on unlawful interference by another owner with the flow of a stream, to show actual and present damage¹ or a present beneficial use.² It is enough if it appears that an injurious effect is produced on the riparian owner's property, such as to diminish its value, if the defendant, by lapse of time, should acquire a right to maintain the diversion or obstruction.³ To establish standing, property owners must allege a reasonable probability of injury to their property due to an obstruction rather than a mere possibility of future injury.⁴

The party seeking to enjoin the construction of a dam has the burden to show that the proposed dam would infringe on the plaintiff's rights.⁵ The party claiming to have been damaged by the obstruction of the flow of a stream or watercourse also has the burden to show that the defendant owner's acts were a substantial contributing cause of the damages suffered.⁶ However, expert testimony is not required to establish causation where it is alleged that dumping dirt altered the course of a stream and caused water to run onto the plaintiff's property where demonstrating causation only requires following the truism that water flows downhill.⁷

An owner of an upper power dam on a stream, who seeks to enjoin the owner of a lower dam from so maintaining it as to prevent the flow of water and interfere with the power generating capacity of the upper dam, must show by a preponderance of the evidence that there are reasonable grounds to fear the continuance or a frequent recurrence of the back flow, so as to affect the value of the upper dam seriously.⁸

The mere fact that a dam in a ditch constructed to carry a portion of the water of a river tends to impede the flow of water through the ditch does not necessarily show injury to the owners of lands on the river.⁹

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Footnotes

- 1 [Robertson v. Arnold](#), 182 Ga. 664, 186 S.E. 806, 106 A.L.R. 681 (1936); [Johnson v. Williams](#), 238 S.C. 623, 121 S.E.2d 223 (1961).
The fact that property on a stream has not as yet been actually damaged by the building of a concrete wall encroaching on the channel of the stream does not prevent bringing an action for an injunction to compel the removal of the wall as constituting a nuisance where it is shown that the encroachment will lessen the carrying capacity of the stream and, as a result, that other property on the stream will be exposed to a greater danger of inundation and damage at high water. [Mullins v. Morgan](#), 176 Va. 201, 10 S.E.2d 593, 131 A.L.R. 785 (1940).
- 2 [Dimmock v. City of New London](#), 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968).
- 3 [Johnson v. Williams](#), 238 S.C. 623, 121 S.E.2d 223 (1961).
- 4 [Brown v. Division of Water Rights of Dept. of Natural Resources](#), 2010 UT 14, 228 P.3d 747 (Utah 2010) (holding that property owners' complaint alleging that when flooding occurs, it was very likely a neighbor's bridge would cause a damming effect on a creek, resulting in increased erosion that would reduce lateral support of the plaintiffs' property, was sufficient to establish standing based on allegations of a likely future injury).
- 5 [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007) (holding that the plaintiff did not demonstrate the existence of a common-law riparian right, considering that such common-law rights had been abolished as of a particular date, unless the owner possessed those rights before that date; there was not any evidence establishing when the plaintiff's land had been severed from the public domain or whether any predecessor in title held vested riparian rights before the date of abolition).
- 6 [Georgia Pacific Corp. v. Armstrong](#), 451 So. 2d 201 (Miss. 1984).
Evidence supported a determination that the downstream proprietor's negligent obstruction of a creek was the proximate cause of damage to the upstream owner's unmaturing soybean crop from flooding resulting

when ponding caused by the obstruction extended back to the upstream owner's property following heavy rain. [Bristol v. Rasmussen](#), 249 Neb. 854, 547 N.W.2d 120 (1996).
7 [Banks v. Dunn](#), 177 N.C. App. 252, 630 S.E.2d 1 (2006).
8 [Sheffield Car Co. v. Constantine Hydraulic Co.](#), 171 Mich. 423, 137 N.W. 305 (1912).
9 [Stimson v. Inhabitants of Brookline](#), 197 Mass. 568, 83 N.E. 893 (1908).

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c. Remedies and Actions

(2) Procedure

§ 118. Trial

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1333, 1335 to 1337

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 53](#) (Judgment or decree—Provision—Enjoining obstruction of stream)

The question of reasonable use with regard to erection of a dam in a stream is for the jury where there is evidence bearing on the question from which different reasonable inferences may be drawn.¹ The question of what damages were caused by interference with the flow of a stream is of fact.²

In a nuisance action by upstream property owners against adjoining downstream property owners for flood damage allegedly caused by the defendants' installation of an inadequate culvert prior to filling a creek bed, the juxtaposition of reasonable use and civil law concepts in the charge placed contradictory instructions before the jury and rendered the charge erroneous, and the evidence did not support an instruction that the jury might consider the inadequate drainage from the defendants' land as the cause of the flooding.³ An instruction on the rights of riparian landowners not containing limiting language concerning the action that may be taken to protect property is defective.⁴

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Footnotes

- 1 [Healey v. Citizens' Gas & Elec. Co., 199 Iowa 82, 201 N.W. 118, 38 A.L.R. 1226 \(1924\).](#)
- 2 [Olney v. Culluloo Park Co., 182 A.D. 560, 169 N.Y.S. 843 \(2d Dep't 1918\).](#)
- 3 [Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 \(1977\).](#)
- 4 [Smicklas v. Spitz, 1992 OK 145, 846 P.2d 362 \(Okla. 1992\).](#)

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78 Am. Jur. 2d Waters III B Refs.

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III. Particular Types of Waters or Water Bodies

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Research References

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  [1070](#), [1171](#), [1229](#), [1232](#) to [1243](#), [1455](#) to [1458](#), [1535](#) to [1551](#), [2646](#) to [2656](#)

A.L.R. Library

A.L.R. Index, Lakes and Ponds

West's A.L.R. Digest, [Water Law](#)  [1070](#), [1171](#), [1229](#), [1232](#) to [1243](#), [1455](#) to [1458](#), [1535](#) to [1551](#), [2646](#) to [2656](#)

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78 Am. Jur. 2d Waters § 119

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Waters

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

1. In General

§ 119. Definition and distinctions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1070

Ordinarily, the controlling distinction between a watercourse¹ and a pond or a lake is that in the one case the water has a natural motion, a current, while in the other the water is, in its natural state, substantially at rest.² However, the existence of a current is not determinative of the character of the body of water.³ While it is generally agreed that a body of water without a current cannot be a stream or watercourse,⁴ the fact of some current in a body of water is not, of itself, sufficient to determine its character as a stream as distinguished from a pond or lake.⁵ Furthermore, neither does the size or depth of a body of water solve the question whether it is a lake or a stream.⁶ The mere facts that water is very shallow, so that marsh grass appears above the surface, it is called a marsh, the water is not deep enough to allow navigation, or the surface is not at all times wholly submerged, does not preclude its being in fact a lake.⁷

Observation:

If it were true that the boundary between a stream and a lake is located at the point where there is no longer a discernible flow, there would not be any consistent boundary because the precise point at which the flow will no longer be detectable will necessarily fluctuate with the seasons.⁸

Great bodies of water that cannot be measured by the unaided vision, and are navigable at all times and in all directions, and border on different states and countries, and find an outlet in the ocean, are in fact seas, however designated, and do not cease to be such or become lakes because of local custom calling them lakes.⁹ Except in the freshness of their waters and the absence of tides, the Great Lakes have all the characteristics of open seas and are inland seas in all other respects.¹⁰ On the other hand, bodies of water, even though of considerable size, which collect only in times of heavy rain, flood, or melting snow, and soon dry up, are not "lakes."¹¹

A "private lake" is a body of water on the surface of land within the exclusive dominion and control of the surrounding landowners.¹²

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Footnotes

- 1 As to natural watercourses, see §§ 86 et seq.
- 2 Libby, McNeil & Libby v. Roberts, 110 So. 2d 82 (Fla. 2d DCA 1959).
- 3 Libby, McNeil & Libby v. Roberts, 110 So. 2d 82 (Fla. 2d DCA 1959).
- 4 § 91.
- 5 Boardman v. Scott, 102 Ga. 404, 30 S.E. 982 (1897).
- 6 Libby, McNeil & Libby v. Roberts, 110 So. 2d 82 (Fla. 2d DCA 1959).
- 7 Libby, McNeil & Libby v. Roberts, 110 So. 2d 82 (Fla. 2d DCA 1959).
- 8 Lake Sunapee Protective Ass'n v. New Hampshire Wetlands Bd., 133 N.H. 98, 574 A.2d 1368 (1990).
A body of water formed in part by river overflow was a "lake," and, thus, a public water. Indianola Co. v. Texas Water Com'n, 749 S.W.2d 771 (Tex. 1988).
- 9 U. S. v. Rodgers, 150 U.S. 249, 14 S. Ct. 109, 37 L. Ed. 1071 (1893).
- 10 Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).
- 11 Barry v. Wittmersehouse, 212 Neb. 909, 327 N.W.2d 33 (1982).
- 12 Carnahan v. Moriah Property Owners Ass'n, Inc., 716 N.E.2d 437 (Ind. 1999).

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78 Am. Jur. 2d Waters § 120

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

1. In General

§ 120. Remedies and actions

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1535 to 1551

A.L.R. Library

[Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569](#)

[Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450](#)

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 90](#) (Complaint, petition, or declaration—By riparian owner—To enjoin trespass on land riparian to public lake)

[Am. Jur. Pleading and Practice Forms, Waters § 222](#) (Complaint, petition, or declaration—Unlawful drainage of natural lake)

[Am. Jur. Pleading and Practice Forms, Waters § 223](#) (Complaint, petition, or declaration—Unlawful drainage of natural pond)

One who is injured by an unlawful interference with a lake, pond, or other natural body of water may maintain an action for the recovery of the damages sustained.¹ An injunction is also available, under the usual rules, for the protection of rights with

respect of such waters, and prevention of any unlawful interference with their use,² such as where a repeated or continuing trespass is claimed.³ Mere failure to object to the construction of a dam and canal that will affect a lake on one's land will not estop the landowner from maintaining an action for an injunction in case the lake is destroyed by the works where there is nothing to show that the landowner knew that this result would follow; nor is the fact of cultivating land left uncovered by draining a lake a waiver of a right of action against the person who wrongfully drained it.⁴

The right of abutting landowners to bring an action against a drainage district to have the surface level of a lake maintained at a certain height above sea level has been upheld.⁵ Plaintiffs were not required to exhaust administrative remedies before filing suits to enjoin water diversions by a city department of water and power based on the theory that the shores, bed, and waters of the lake were protected by the public trust.⁶ However, a court will not grant an injunction against raising the level of a lake on the assumption that it will interfere with the flow of water from springs in the bed of the lake in the absence of evidence to establish that fact.⁷ Nor will an injunction be granted against unlawfully raising the height of the water of a public lake, where it was drawn down after someone complained, and repetition of the act is improbable.⁸

A plaintiff who does not show a special or peculiar injury to oneself by reason of the erection of a structure in a public lake may not maintain an action to compel its removal.⁹

The United States may maintain a suit to prevent the withdrawal of water from one of the Great Lakes, not only to prevent interference with interstate and foreign commerce but also to fulfill treaty obligations with Canada, and perhaps, also, on the footing of an ultimate sovereign interest in the Great Lakes.¹⁰ The Attorney General of the United States, by virtue of the office, may bring a suit to protect the water of the Great Lakes from withdrawal without special statutory authority.¹¹ Danger to the inhabitants of a city from denial of the right to divert water from a navigable lake of the United States for the purpose of diluting sewage may not be considered by the court in a suit for an injunction as against the power of Congress to forbid the withdrawal of water from the lake as an interference with its navigability.¹²

A statute of limitations on actions by a state for recovery of land does not apply to any property, right, title, or interest of the state below the high-water mark or "in the great ponds."¹³

CUMULATIVE SUPPLEMENT

Cases:

Upland owner's dock that extended onto submerged land of adjacent property owner did not exceed what was necessary to facilitate access to intracoastal waterway that bounded upland owner's property, and thus upland owner had littoral right to dock; dock was only means for access to waterway as nearest navigable waters, and, due to shallow water depths, dock of at least 85 feet, extending onto submerged owner's land, was necessary to safely dock boat of average size. [BB Inlet Property, LLC v. 920 N. Stanley Partners, LLC](#), 293 So. 3d 538 (Fla. 4th DCA 2020).

In order for littoral landowners to successfully pursue claims for injunctive relief, based on other littoral landowners' construction of oversized, two-story boat house that interfered with their view of lake, their claims had to be based on a valid cause of action that afforded them the injunctive remedy which they sought. [Newton v. MJK/BJK, LLC](#), 469 P.3d 23 (Idaho 2020).

[END OF SUPPLEMENT]

Footnotes

- 1 [Madson v. Spokane Valley Land & Water Co.](#), 40 Wash. 414, 82 P. 718 (1905), writ dismissed, 212 U.S. 565, 29 S. Ct. 691, 53 L. Ed. 653 (1909).
As to enforcement of riparian or littoral rights, generally, see § 53.
- 2 [Taylor v. Tampa Coal Co.](#), 46 So. 2d 392 (Fla. 1950); [Snively v. Jaber](#), 48 Wash. 2d 815, 296 P.2d 1015, 57 A.L.R.2d 560 (1956) (injunction against boat livery as a nuisance).
Church that owned all land surrounding a nonnavigable private lake was entitled to an injunction excluding the public from the surface of the lake. [Michigan Conference Ass'n of Seventh-Day Adventists v. Commission of Natural Resources](#), 70 Mich. App. 85, 245 N.W.2d 412 (1976).
- 3 [Lanier v. Ocean Pond Fishing Club, Inc.](#), 253 Ga. 549, 322 S.E.2d 494 (1984) (repeated boating and fishing by a neighbor for five years in the waters of a pond above submerged land owned by a fishing club was a continuing trespass, and was properly enjoined, even though the neighbor owned the submerged land under a small area of the pond).
Servient owners subject to an easement for ingress and egress to a lake were entitled to injunctive relief against the dominant owner that placed a boat dock on the surface of the lake, based on trespass, where the easement was intended only for the purpose of securing ingress and egress to the lake and related, transitory uses such as swimming and launching boats. [Grider v. Tingle](#), 325 S.W.3d 437 (Mo. Ct. App. S.D. 2010).
- 4 [Madson v. Spokane Valley Land & Water Co.](#), 40 Wash. 414, 82 P. 718 (1905), writ dismissed, 212 U.S. 565, 29 S. Ct. 691, 53 L. Ed. 653 (1909).
- 5 [Arkansas State Game & Fish Commission v. Kizer](#), 222 Ark. 673, 262 S.W.2d 265, 39 A.L.R.2d 1372 (1953).
- 6 [National Audubon Society v. Superior Court](#), 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P.2d 709 (1983).
The public trust doctrine is discussed in § 128.
- 7 [Preston v. Clark](#), 238 Mich. 632, 214 N.W. 226, 53 A.L.R. 194 (1927).
- 8 [State v. Sunapee Dam Co.](#), 70 N.H. 458, 50 A. 108 (1901).
- 9 [McCormick v. Chicago Yacht Club](#), 331 Ill. 514, 163 N.E. 418, 60 A.L.R. 763 (1928).
- 10 [Sanitary Dist. of Chicago v. U.S.](#), 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).
- 11 [Sanitary Dist. of Chicago v. U.S.](#), 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).
- 12 [Sanitary Dist. of Chicago v. U.S.](#), 266 U.S. 405, 45 S. Ct. 176, 69 L. Ed. 352 (1925).
- 13 [Boston Waterfront Development Corp. v. Com.](#), 378 Mass. 629, 393 N.E.2d 356 (1979).

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78 Am. Jur. 2d Waters § 121

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Waters

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 121. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1455 to 1457

Forms

[Am. Jur. Legal Forms 2d § 260:37](#) (Deed—Granting lake and lake bed)

Small waters and manmade lakes and ponds may be privately owned and in that case may not be taken without just compensation.¹ If a state does not own a lake in its sovereign capacity, title to the lake's bed is held by the riparian owners.²

Private ownership of the bed of a lake does not carry with it the ownership of the water,³ and the legislature does not have the authority to grant to private persons for private purposes the right to control the height of water in a lake that is held by the public in trust for public uses.⁴ Also, a state does not lose its right to exercise authority over a lake merely because the lake bed is subject to private ownership.⁵

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Footnotes

¹ [Ryals v. Pigott](#), 580 So. 2d 1140 (Miss. 1990).

² [Town of North Elba v. Grimditch](#), 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).

- 3 [State Game and Fish Commission v. Louis Fritz Co.](#), 187 Miss. 539, 193 So. 9 (1940).
Ownership of all lands surrounding a lake did not confer ownership of water on the landowner. [J.J.N.P. Co. v. State, By and Through Div. of Wildlife Resources](#), 655 P.2d 1133 (Utah 1982).
An individual seeking a declaratory judgment that bodies of water on which the person harvested rice were private and not subject to any control by the state did not own the waters in a proprietary sense because the person did not have title to the waters in their natural state, at least not until they had been artificially confined, and merely owned riparian rights to use and enjoyment of the water. [Pratt v. State, Dept. of Natural Resources](#), 309 N.W.2d 767 (Minn. 1981).
- 4 [Hazen v. Perkins](#), 92 Vt. 414, 105 A. 249, 23 A.L.R. 748 (1918).
- 5 [North Dakota State Water Com'n v. Board of Managers](#), 332 N.W.2d 254 (N.D. 1983).

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78 Am. Jur. 2d Waters § 122

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 122. Nonnavigable lakes and ponds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1455 to 1458

In most jurisdictions, it is the general rule that lakes and ponds that are nonnavigable, and their beds and shores, belong to the owners of the adjacent land.¹ Ordinarily, state law controls questions of the title to the beds of nonnavigable lakes and streams unless the United States has expressed its intent when disposing of riparian lands.²

Observation:

If waters are not navigable, the title of the United States to land underlying them remains unaffected by the creation of a new state.³

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Footnotes

¹ [Hardin v. Jordan](#), 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891); [Orr v. Mortvedt](#), 735 N.W.2d 610 (Iowa 2007).

Where a conveyance of title of property adjacent to a pond did not show the intention to withhold underwater lands from the grant by expressly excluding underwater land, the grantees may not be precluded from using the pond. [Knapp v. Hughes](#), 19 N.Y.3d 672, 957 N.Y.S.2d 640, 981 N.E.2d 236 (2012).

As to boundaries and apportionment of the beds of lakes and ponds as between littoral proprietors, see § 314.

As to application of the doctrines of accretion, reliction, erosion, and avulsion with regard to lakes and ponds, see § 336.

As to apportionment of accretions, see § 340.

As to adverse possession with regard to lakes and their beds, see [Am. Jur. 2d, Adverse Possession § 274](#).

2 [Yankton Sioux Tribe of Indians v. Nelson](#), 683 F.2d 1160 (8th Cir. 1982).

As to the effect of a federal grant of abutting lands, see § 127.

3 [State of Or. By and Through Division of State Lands v. Riverfront Protection Ass'n](#), 672 F.2d 792 (9th Cir. 1982).

As to the rule that the title to navigable lakes passes to the state upon admission to the Union, see § 124.

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 123. Navigable lakes

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  2646 to 2656

Some states follow the rule that the bed of a navigable lake belongs to the adjoining landowners.¹ In other states, the rule is that lakes and ponds that are navigable, and their beds and shores, are owned by the state,² usually to the ordinary high-water mark,³ although the owner of land on which a navigable lake is formed during the person's ownership is not thereby deprived of title.⁴

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Footnotes

- ¹ [Hilt v. Weber](#), 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930).
For the rule in the case of the Great Lakes, see §§ 125, 152.
- ² [Hardin v. Shedd](#), 190 U.S. 508, 23 S. Ct. 685, 47 L. Ed. 1156 (1903) (applying Illinois law).
When Louisiana was admitted to the Union in 1812, it acquired title to the beds of all navigable streams and lakes by reason of its inherent sovereignty; hence, if a body of water is navigable and has never been validly patented to an individual, the bed belongs to the state. [Olin Gas Transmission Corp. v. Harrison](#), 132 So. 2d 721 (La. Ct. App. 1st Cir. 1961).
- ³ [Lake CDA Investments, LLC v. Idaho Dept. of Lands](#), 149 Idaho 274, 233 P.3d 721 (2010); [Orr v. Mortvedt](#), 735 N.W.2d 610 (Iowa 2007); [State v. Cockrell](#), 162 So. 2d 361 (La. Ct. App. 1st Cir. 1964), writ refused, 246 La. 343, 164 So. 2d 350 (1964).
The mere temporary recession of the waters of a navigable lake occasioned by the seasons or by periods of drought does not give a riparian owner any of the rights of ownership in land beyond the meandered line. [Hillebrand v. Knapp](#), 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).
- ⁴ [State v. West Tennessee Land Co.](#), 127 Tenn. 575, 158 S.W. 746 (1913).

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78 Am. Jur. 2d Waters § 124

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 124. Navigable lakes—Title of United States or state

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  2647 to 2650

Under the "equal footing" doctrine, new States are admitted to the Union on an equal footing with the original 13 Colonies¹ and succeed to the United States' title to the beds of navigable waters within their boundaries.² Thus, a state owns stray logs and the like submerged under a navigable lake, based on the equal footing doctrine and a state constitutional provision vesting ownership of beds and shores of all navigable waters in the state.³ However, only lands shoreward of the low-water line, that is, the periodically submerged tidelands and inland navigable waters, pass to a state under the equal footing doctrine.⁴

There is a strong presumption against finding that Congress, by actions prior to the admission of a state into the Union, intended to defeat a future state's entitlement to land under navigable waters where Congress adopted early and has constantly adhered to a policy of holding land under navigable waters for the ultimate benefit of future states.⁵ It may not be inferred that Congress intended to defeat a future state's title to land under navigable waters unless the intention was definitely declared or otherwise made very plain, and when Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat a future state's claim to the land.⁶ When Congress reserves such land for a particular purpose, however, even assuming that the U.S. Constitution permits Congress to defeat a future state's title to such land by such a reservation, Congress may not intend to defeat the future state's title because such land remains in federal control, and therefore may still be held for the ultimate benefit of future states, and even if such land passes to a state, the federal government may still control, develop, and use the waters for its own purposes.⁷

Under the "equal footing" principle, a state's claim to submerged land rests on whether the lake over the claimed bed was navigable at the time of the state's admission to the Union.⁸ The fact that the Great Salt Lake is not part of a navigable interstate

or international commercial highway does not interfere with the principle that the State owns its bed since it was navigable at the time Utah was made a state and the lake bed then passed to the State.⁹

CUMULATIVE SUPPLEMENT

Cases:

Under the equal-footing doctrine, each new state after the 13 original states acquired the same title to the beds of navigable waters within its borders as had transferred to the original 13 states following the American Revolution; thus, upon statehood, each state gained title within its borders to the beds of waters then navigable, while the United States retained any title vested in it before statehood to any land beneath waters not then navigable. [Chernaik v. Brown](#), 367 Or. 143, 475 P.3d 68 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Am. Jur. 2d, Constitutional Law § 220; Am. Jur. 2d, States, Territories, and Dependencies § 17.](#)
- 2 [Am. Jur. 2d, States, Territories, and Dependencies § 18.](#)
- 3 [In re Tortorelli](#), 149 Wash. 2d 82, 66 P.3d 606 (2003).
As to title to navigable waters, generally, see § 147.
- 4 [U.S. v. Alaska](#), 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
- 5 [Utah Div. of State Lands v. U.S.](#), 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987).
- 6 [Utah Div. of State Lands v. U.S.](#), 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987).
- 7 [Utah Div. of State Lands v. U.S.](#), 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987).
As to federal regulation of navigable waters, see § 151.
- 8 [Block v. North Dakota ex rel. Bd. of University and School Lands](#), 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983); [Utah v. U.S.](#), 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971).
As to the determination whether a water is navigable, generally, see §§ 149 et seq.
- 9 [Utah v. U.S.](#), 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971).

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78 Am. Jur. 2d Waters § 125

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Waters

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 125. Great Lakes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  2646 to 2656

A.L.R. Library

[Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569](#)

The title to and dominion over lands covered by water of the Great Lakes, within the limits of the several states bordering on it, belong to each state.¹ It holds the fee in trust for the public in the same way that it holds the title to the soil under tidewaters by the common law.² The courts have not fully agreed whether the title goes to the high- or low-water mark, but they have agreed that except for special purposes, the beds of the lakes are not susceptible of private ownership.³ The extent of state ownership with respect to the Great Lakes has been variously described as land that was submerged when the state entered the Union and was in fact lake bed,⁴ land covered by tide waters,⁵ and to the "natural shoreline," which is the line at which the water usually stands when free from disturbing causes.⁶

The public trust doctrine⁷ serves to protect the waters of the Great Lakes and their submerged lands shared in common by the public.⁸ The trust by which the waters of the Great Lakes within a state are held by the State is governmental, and the State as trustee for the people may not, by acquiescence or otherwise, abandon the trust property or permit diversion of it to a private use different from the object for which the trust was created.⁹

Observation:

Because the public trust doctrine preserves public rights separate from a landowner's fee title, the boundary of the public trust to the shores of the Great Lakes need not equate with the boundary of a landowner's littoral title.¹⁰

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Footnotes

- 1 [Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 \(1892\).](#)
- 2 [Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 \(1892\).](#)
- 3 [Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 \(1892\); Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 \(1891\).](#)
[As to state boundaries in the Great Lakes under the Submerged Lands Act, see § 302.](#)
- 4 [Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 \(1930\).](#)
- 5 [City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997 \(N.D. Ill. 2008\).](#)
- 6 [State ex rel. Merrill v. Ohio Dept. of Natural Resources, 130 Ohio St. 3d 30, 2011-Ohio-4612, 955 N.E.2d 935 \(2011\).](#)
- 7 [§ 128.](#)
- 8 [Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58 \(2005\).](#)
- 9 [State v. Cleveland & P. R. Co., 94 Ohio St. 61, 113 N.E. 677 \(1916\).](#)
- 10 [Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58 \(2005\).](#)

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78 Am. Jur. 2d Waters § 126

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Waters

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

2. Ownership

§ 126. Great ponds

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1455 to 1457

A.L.R. Library

[Rights of fishing, boating, bathing, or the like in inland lakes](#), 57 A.L.R.2d 569

In several New England states, by virtue of the Ordinance of 1647, the title to the "great ponds," which may be defined as ponds covering over 10 acres, is vested in the state.¹ The State owns these ponds as public property in trust for public uses.² Although waters of great ponds are public waters, littoral owners nevertheless have private property rights that are separate from, independent of, and more extensive than the rights of the general public.³

The littoral proprietors of land on the ponds do not have peculiar rights in the soil or in the waters unless it is by grant from the legislature.⁴ Explicit legislative authority is necessary for alienation to an individual of the public rights in the beds of large ponds.⁵ However, the rights in a great pond that had been appropriated to private persons, and were held by them as private property at the time the ordinance became operative, were not affected.⁶ The title to great ponds passed under deeds from Plymouth Colony, which plainly intended to convey them, although that intention appears only from the habendum clauses of the deeds, no mention of them being found in the granting clauses.⁷ If a pond had previously been granted to a town, and had not passed to a private person, the legal title remains in the town, but the beneficial right is in the public.⁸

Where a statute of limitations is made applicable to suits by the commonwealth, a prescriptive title can be acquired to a great pond.⁹ However, mere use of the water for mill privileges is not so adverse to the rights of the public to the water that it will ripen into a title that prevents a state grant to a city of the right to use the water for the domestic purposes of its inhabitants.¹⁰

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Footnotes

- 1 [City of Auburn v. Union Water-Power Co.](#), 90 Me. 576, 38 A. 561 (1897); [Concord Mfg. Co. v. Robertson](#), 66 N.H. 1, 25 A. 718 (1890).
- 2 [Bell v. Town of Wells](#), 510 A.2d 509 (Me. 1986).
As to the State's ownership being in trust, generally, see § 128.
- 3 [Sundell v. Town of New London](#), 119 N.H. 839, 409 A.2d 1315 (1979).
- 4 [City of Auburn v. Union Water-Power Co.](#), 90 Me. 576, 38 A. 561 (1897); [Butler v. Attorney General](#), 195 Mass. 79, 80 N.E. 688 (1907).
- 5 [Concord Mfg. Co. v. Robertson](#), 66 N.H. 1, 25 A. 718 (1890).
- 6 [Watuppa Reservoir Co. v. City of Fall River](#), 154 Mass. 305, 28 N.E. 257 (1891).
- 7 [Watuppa Reservoir Co. v. City of Fall River](#), 154 Mass. 305, 28 N.E. 257 (1891).
- 8 [Attorney General v. Revere Copper Co.](#), 152 Mass. 444, 25 N.E. 605 (1890).
- 9 [Attorney General v. Revere Copper Co.](#), 152 Mass. 444, 25 N.E. 605 (1890).
- 10 [City of Auburn v. Union Water-Power Co.](#), 90 Me. 576, 38 A. 561 (1897).

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III. Particular Types of Waters or Water Bodies


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2. Ownership

§ 127. Under public grant of abutting land

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1455 to 1457

Where the United States has made, without any reservation or restriction, grants of public lands bounded on lakes or ponds, the effect of the grant with regard to rights to the lake or pond is usually governed by the law of the state in which the lands are situated.¹ It has been stated that the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned,² and that even where a federal court has once declared the effect of a grant, and subsequent decisions of the state courts declare the effect differently, the federal court will change its ruling and follow the rule of the state court with regard to the effect of grants within the state's borders.³ On the other hand, the general rule described above does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the Swamp Land Act, but is simply a convenient way of determining the effect of a grant.⁴ Where the United States conveyed land to a state but retained title to the beds of nonnavigable waters, federal law governs the construction of the disposition of federal lands.⁵ With very few minor exceptions, the general rule is that title to the beds of small lakes and ponds passes into private ownership with a grant of the littoral or abutting land.⁶ While if the federal government did not express a clear intent concerning the beds of lakes, federal law looks to the law of the state in which the land lies or to the common law,⁷ various federal law presumptions apply if the plat by which the lands were conveyed indicates the existence of a meandered lake.⁸ If the lake existed at the time of the survey, the land encircled by the meander lines around the lake was not expressly granted by the federal government but was impliedly conveyed to the patentees of the lots abutting the lake, and thus the adjoining landowners take title not only to the land described in the patent but also to the land between the meander line and the water and to a ratable portion of the lake bed, at least where nothing indicated that the United States reserved an interest in the lake.⁹

Title to navigable lakes may not be granted by the state into private ownership and therefore does not pass under a grant of the abutting land.¹⁰ In some cases, following the common-law rule, it has been held that the State, by a grant of abutting land, may vest the title to the beds of lakes in individuals but that the question in each case is whether by the form of grant, the intention to do so was shown, and if the grant is bounded by the water, the intention is to pass title to the center.¹¹ Although, by the common law, the soil under small inland lakes, whether actually capable of navigation or not, may pass with the abutting land into possession of private owners, it may be excluded by the terms of the grant.¹²

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Footnotes

- 1 [Marshall Dental Mfg. Co. v. State of Iowa](#), 226 U.S. 460, 33 S. Ct. 168, 57 L. Ed. 300 (1913).
- 2 [Hardin v. Shedd](#), 190 U.S. 508, 23 S. Ct. 685, 47 L. Ed. 1156 (1903).
- 3 [Bernot v. Morrison](#), 81 Wash. 538, 143 P. 104 (1914), dismissed, 250 U.S. 648, 39 S. Ct. 492, 63 L. Ed. 1188 (1919).
- 4 [Hardin v. Shedd](#), 190 U.S. 508, 23 S. Ct. 685, 47 L. Ed. 1156 (1903); [Bernot v. Morrison](#), 81 Wash. 538, 143 P. 104 (1914), dismissed, 250 U.S. 648, 39 S. Ct. 492, 63 L. Ed. 1188 (1919).
- 5 [Mesenbrink v. Hosterman](#), 147 Idaho 408, 210 P.3d 516 (2009).
- 6 [Kean v. Calumet Canal & Improvement Co.](#), 190 U.S. 452, 23 S. Ct. 651, 47 L. Ed. 1134 (1903).
- 7 [Bourgeois v. U. S.](#), 212 Ct. Cl. 32, 545 F.2d 727 (1976); [Mesenbrink v. Hosterman](#), 147 Idaho 408, 210 P.3d 516 (2009).
- 8 [Mesenbrink v. Hosterman](#), 147 Idaho 408, 210 P.3d 516 (2009).
- 9 [Mesenbrink v. Hosterman](#), 147 Idaho 408, 210 P.3d 516 (2009).
- 10 [State v. Korrer](#), 127 Minn. 60, 148 N.W. 1095 (1914); [Hazen v. Perkins](#), 92 Vt. 414, 105 A. 249, 23 A.L.R. 748 (1918).
- 11 As to the state's ownership being in trust, generally, see § 128.
[Hardin v. Jordan](#), 140 U.S. 371, 11 S. Ct. 838, 35 L. Ed. 428 (1891).
It was said that the decisions relating to the ownership of land under water of inland lakes are founded on the principles of law applicable to rivers (discussed in § 92); the lake involved in that case was two-thirds of a mile in length and half a mile in breadth. [Calkins v. Hart](#), 219 N.Y. 145, 113 N.E. 785 (1916).
- 12 [Stavanau v. Gray](#), 143 Minn. 1, 172 N.W. 885 (1919).

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Waters

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III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

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§ 128. Character and incidents of state ownership; public trust

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  2647, 2651

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[Rights of fishing, boating, bathing, or the like in inland lakes](#), 57 A.L.R.2d 569

Law Reviews and Other Periodicals

Blumm and Doot, [Oregon's public trust doctrine: public rights in waters, wildlife, and beaches](#), 42 Env'tl. L. 375 (Winter 2012)

Where a lake is owned by a state, it holds the submerged lands in trust for public use, substantially the same as submerged lands under navigable waters at common law, and it does not have a proprietary right in such beds or in the water above them, which it may sell or otherwise divest.¹ Under the public trust doctrine, the State holds the title to the beds of navigable lakes below the natural high-water mark for the use and benefit of the whole people; this trust preserves the public's right of use.² In this view, the title to the beds of the lakes and ponds becomes vested in the state at the instant of its admission into the Union,³ in trust for the benefit of its people, so as to preserve to them forever the enjoyment of the water of those lakes and ponds to the

same extent that the public is entitled to enjoy tidal waters at the common law.⁴ It has been stated that the right of the State to use the bed of a lake, except for a paramount trust purpose, is subordinate to that of the littoral owner.⁵

The title to land under lakes and ponds held by the State does not change by reason of the fact that the lakes or ponds are artificially filled so as to raise the land above the surface of the water.⁶

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Footnotes

- 1 [Hillebrand v. Knapp](#), 65 S.D. 414, 274 N.W. 821, 112 A.L.R. 1104 (1937).
As to ownership of navigable waters being subject to a public trust, see § 161.
- 2 [In re Sanders Beach](#), 143 Idaho 443, 147 P.3d 75 (2006).
- 3 § 124.
- 4 [Rutten v. State](#), 93 N.W.2d 796 (N.D. 1958).
The public trust doctrine requires that the state, as trustee, preserve public rights in the lakes and lands submerged beneath them. [Glass v. Goeckel](#), 473 Mich. 667, 703 N.W.2d 58 (2005).
The effect of the Submerged Lands Act [43 U.S.C.A. §§ 1301 et seq.] was to reaffirm the title of states to lands beneath navigable waters at time of statehood. [State of N.D. ex rel. Bd. of University and School Lands v. Andrus](#), 671 F.2d 271 (8th Cir. 1982), judgment rev'd on other grounds, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983).
- 5 [Hilt v. Weber](#), 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930).
- 6 [Illinois Steel Co. v. Bilot](#), 109 Wis. 418, 85 N.W. 402 (1901).
As to the reclamation of submerged lands, generally, see §§ 347 et seq.

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III. Particular Types of Waters or Water Bodies

B. Lakes and Ponds

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§ 129. Boundary between lake or pond held in public ownership and adjoining land

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1458

Where a lake or pond is held in public ownership, the boundary line between the public proprietor and the owner of the adjacent upland is usually the water's edge¹ or low-water mark.² It has also been held that the true boundary is the line at which the water usually stands when free from disturbing causes.³ In some cases, however, it has been held that the boundary line is the ordinary high-water mark.⁴

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Footnotes

- ¹ [Hilt v. Weber](#), 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930) (apparently approving the low-water mark boundary).
- ² [Com. of Massachusetts v. State of New York](#), 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926); [Stewart v. Turney](#), 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923).
As to boundaries where the bed of the lake or pond is held in private ownership, see [Am. Jur. 2d, Boundaries § 12](#).
As to boundaries and apportionment of the beds of lakes and ponds between littoral proprietors, see [§ 314](#).
- ³ [City of Chicago v. Ward](#), 169 Ill. 392, 48 N.E. 927 (1897).
- ⁴ [Rutten v. State](#), 93 N.W.2d 796 (N.D. 1958); [Doemel v. Jantz](#), 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923).

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  [1232](#), [1237](#) to [1243](#)

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[Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 A.L.R.4th 568](#)

[Rights of fishing, boating, bathing, or the like in inland lakes, 57 A.L.R.2d 569](#)

[Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450](#)

Forms

[Am. Jur. Legal Forms 2d §§ 260:38 et seq.](#) (Provisions in deeds granting lake rights)

[Am. Jur. Pleading and Practice Forms, Waters § 4](#) (Complaint, petition, or declaration—To enjoin wrongful use of artificial lake created by plaintiff)

[Am. Jur. Pleading and Practice Forms, Waters § 6](#) (Complaint, petition, or declaration—To enjoin interference with rights in private lake—Against builder of dam causing water level of lake to rise)

Am. Jur. Pleading and Practice Forms, Waters § 90 (Complaint, petition, or declaration—By riparian owner—To enjoin trespass on land riparian to public lake)

The owners of the bed of a private, nonnavigable lake¹ and their licensees have the right to reasonable use and enjoyment of the surface waters of the entire lake, provided they do not unduly interfere with the reasonable use of the water by other owners and their licensees.² The owner of a nonnavigable lake has exclusive boating rights, and a person putting a boat in the lake of another without permission is a trespasser.³ A stranger does not have the right to enter upon an inland nonnavigable lake without the permission of an abutting owner.⁴ The public does not have the right to use a dead-end lake completely surrounded by private land even though a navigable swamp or channel gives access to the lake.⁵

There is an absence of public rights, including fishing rights, in privately owned lakes.⁶ Private rights may be acquired in a private lake by prescription.⁷

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Footnotes

- 1 § 122.
- 2 *Beacham v. Lake Zurich Property Owners Ass'n*, 123 Ill. 2d 227, 122 Ill. Dec. 14, 526 N.E.2d 154 (1988).
As to riparian or littoral rights, generally, see §§ 33 to 54.
As to the rights of partial owners, see § 132.
- 3 *Lanier v. Ocean Pond Fishing Club, Inc.*, 253 Ga. 549, 322 S.E.2d 494 (1984).
- 4 *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015, 57 A.L.R.2d 560 (1956).
- 5 *People v. Summer School of Painting at Saugatuck, Inc.*, 105 Mich. App. 550, 307 N.W.2d 87 (1981).
- 6 *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976).
- 7 *Loughran v. Matylewicz*, 367 Pa. 593, 81 A.2d 879 (1951).

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§ 131. Right of public in shore of inland navigable lake

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1234 to 1236

A.L.R. Library

[Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 A.L.R.4th 568](#)

[Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776](#)

Law Reviews and Other Periodicals

Blumm and Doot, [Oregon's public trust doctrine: public rights in waters, wildlife, and beaches, 42 Env'tl. L. 375 \(Winter 2012\)](#)

Littoral rights are usually concerned with the use and enjoyment of the shore of a lake or the like.¹ It has been recognized in cases dealing with the rights of the public in the shore of an inland navigable lake that the public has the right to travel on the strip between the high- and low-water marks and to use that strip to gain access to the water, and to hunt and fish from there, at least to the extent that such use does not unreasonably interfere with the littoral owner's right of ingress to or egress from the

water.² However, it has been elsewhere recognized that the public does not have the right to come upon such a strip of land or so much of it as is not covered by water since the upland owner's right to the strip on an inland navigable lake is exclusive.³

The public has the right, under some authorities, to place various facilities on the strip of land between the water marks in connection with the public's use and enjoyment of the water.⁴ However, it has also been held that members of the public do not have a right to maintain a wharf from the shore into a lake if the littoral owner objects.⁵

Where the upland owner's right is exclusive, the public does not have a right to an unobstructed view of the water over the shore line strip of land against the littoral owner's right to build structures there that would block the view.⁶

It has been recognized in the circumstances of several cases dealing with the rights of the public in the shore of an inland navigable lake that the public has the right to raise or maintain the water level of the lake, by artificial or natural means, up to any point at or below the high-water mark,⁷ and the right to the maintenance of the strip of land in such condition that it would become submerged as the level of the waters rose because of fluctuations in the water level.⁸

CUMULATIVE SUPPLEMENT

Cases:

State permitted recreational use of lake within meaning of recreational use immunity statute, even if swimmer, who was injured after diving into lake, had right to use lake as navigable water, where state developed and maintained day use areas and facilities for recreating in the lake, including facilities for boating and swimming, and only way to safely access the lake was to use one of the three day use areas. [Or. Rev. Stat. § 105.682. McCormick v. State by and through Oregon State Parks and Recreation Department, 366 Or. 452, 466 P.3d 10 \(2020\).](#)

Interference with the public's access to public waterways can, itself, be a substantial impairment of the public's right to use the water for public trust purposes. [Kramer v. City of Lake Oswego, 365 Or. 422, 446 P.3d 1 \(2019\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Secretary of State v. Gunn, 75 So. 3d 1015 \(Miss. 2011\).](#)
As to riparian or littoral rights, generally, see §§ 33 to 54.
- 2 [Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 \(1942\); Evans v. Dugan, 205 La. 398, 17 So. 2d 562 \(1944\).](#)
Generally, as to right of public to fish in navigable lakes and ponds, see [Am. Jur. 2d, Fish, Game and Wildlife Conservation § 14.](#)
- 3 [Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232, 40 A.L.R.3d 760 \(1969\).](#)
- 4 [Anderson v. Reames, 204 Ark. 216, 161 S.W.2d 957 \(1942\); Evans v. Dugan, 205 La. 398, 17 So. 2d 562 \(1944\).](#)
- 5 [Musgrove v. Cicco, 96 N.H. 141, 71 A.2d 495 \(1950\).](#)
- 6 [Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232, 40 A.L.R.3d 760 \(1969\).](#)
- 7 [State ex rel. Clark v. Deisch, 38 S.D. 560, 162 N.W. 365 \(1917\); Anderson v. Ray, 37 S.D. 17, 156 N.W. 591 \(1916\).](#)

8 [Wilbour v. Gallagher, 77 Wash. 2d 306, 462 P.2d 232, 40 A.L.R.3d 760 \(1969\).](#)

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III. Particular Types of Waters or Water Bodies


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3. Uses; Public and Private Rights

§ 132. Nature and extent of rights of part owners

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West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1229

A.L.R. Library

[Rights of fishing, boating, bathing, or the like in inland lakes](#), 57 A.L.R.2d 569

In some cases, the view has been taken that one who owns a small portion of the bed of an inland lake, in connection with its bordering uplands, does not have the right to use the whole lake for boating¹ and like purposes in common with the other owners; each owner has exclusive control and use of the waters within the limits of that owner's boundaries.² In other cases, it has been held that each of several riparian owners on an inland lake whose titles include the land covered by water may, together with their lessees and licensees, use the entire surface of the lake for boating³ and other proper purposes to the extent that those owners do not interfere with the reasonable use of the water by other riparian owners, and they are not limited to the portion within their respective boundaries.⁴

Observation:

Statutes expressing a state's policy with respect to flood control and conservation of water resources were not intended to prescribe the relative rights of multiple owners to use and enjoy landlocked nonnavigable lakes.⁵

Where the ownership of the land underlying a manmade lake is clear and distinct, the owner of a portion of the lake bed has exclusive control and use of the water above that portion of the lake bed that the person owns, including the right to exclude others, including other adjoining owners of the lake bed, by erecting a fence or other barrier to prohibit others from utilizing the water that overlies the owner's property.⁶ Thus, property owners who obtained their ownership of an artificial, nonnavigable pond and the underlying pond bed by a deed describing their property in terms of metes and bounds have ownership in severalty for whatever portion of the pond bed they own.⁷ However, where a lake in a quarry becomes a legally natural lake under an artificial-becomes-natural rule, each adjoining owner, who owns a portion of the lake bed, is entitled to reasonable use and enjoyment of the entire surface of the water.⁸

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Footnotes

- 1 [Am. Jur. 2d, Boats and Boating § 29.](#)
- 2 [Taylor Fishing Club v. Hammett](#), 88 S.W.2d 127 (Tex. Civ. App. Waco 1935), writ dismissed.
Each owner of the bed of an inland, nonnavigable lake has the right to the free and unmolested use and control of the owner's portion of the lake bed and water over it for boating and fishing. [Carnahan v. Moriah Property Owners Ass'n, Inc.](#), 716 N.E.2d 437 (Ind. 1999).
The owner of the bed of a nonnavigable lake has the exclusive right to the use of the surface of the waters above and may exclude other bed owners and fence off the owner's portion. [Lanier v. Ocean Pond Fishing Club, Inc.](#), 253 Ga. 549, 322 S.E.2d 494 (1984).
A nuisance and encroachment on a plaintiff's littoral rights were found where the defendant's dock on an inland lake was located immediately adjacent to the plaintiff's shore front, had been dramatically increased in size and use, totally obscured the plaintiff's view, and created a safety hazard for the plaintiff when swimming within the plaintiff's own water space. [Heston v. Ousler](#), 119 N.H. 58, 398 A.2d 536, 14 A.L.R.4th 1021 (1979).
- 3 [Ours v. Grace Property, Inc.](#), 186 W. Va. 296, 412 S.E.2d 490 (1991).
As to relative boating rights of abutting owners on inland lakes, see [Am. Jur. 2d, Boats and Boating § 29.](#)
- 4 [Improved Realty Corp. v. Sowers](#), 195 Va. 317, 78 S.E.2d 588 (1953); [Snively v. Jaber](#), 48 Wash. 2d 815, 296 P.2d 1015, 57 A.L.R.2d 560 (1956).
- 5 [Orr v. Mortvedt](#), 735 N.W.2d 610 (Iowa 2007).
- 6 [Ours v. Grace Property, Inc.](#), 186 W. Va. 296, 412 S.E.2d 490 (1991).
As to riparian or littoral rights with regard to artificial bodies of water, see [§ 45.](#)
- 7 [Ace Equipment Sales, Inc. v. Buccino](#), 273 Conn. 217, 869 A.2d 626 (2005).
- 8 [Bohne v. La Salle Nat. Bank](#), 399 Ill. App. 3d 485, 339 Ill. Dec. 501, 926 N.E.2d 976 (2d Dist. 2010).

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78 Am. Jur. 2d Waters § 133

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Waters

Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Eric C. Surette, J.D.

III. Particular Types of Waters or Water Bodies


B. Lakes and Ponds

3. Uses; Public and Private Rights

§ 133. Interference with or alteration of natural or normal conditions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1229, 1238

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[Liability for overflow of water confined or diverted for public power purposes, 91 A.L.R.3d 1065](#)

[Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450](#)

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 6](#) (Complaint, petition, or declaration—To enjoin interference in rights in private lake—Against builder of dam causing water level of lake to rise)

[Am. Jur. Pleading and Practice Forms, Waters § 304](#) (Complaint, petition, or declaration—Land inundated by reservoir—Maintained by municipality)

Generally speaking, littoral owners on a lake have a right to the lake continuing in its natural condition.¹ Private individuals do not have the right, ordinarily, without legislative authorization, to raise or lower the level of the waters of a public lake.²

Unauthorized interference with the level of the waters of a public lake to the injury of common or public rights is a public nuisance.³ However, an abutting owner has the right, as against downstream owners, to raise the level of a lake feeding the stream to afford a spawning ground for fish and shallow beaches for resort purposes.⁴

Observation:

There may be a statutory method for petitioning to change the level of a lake.⁵

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Footnotes

- 1 Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950); Tilden v. Smith, 94 Fla. 502, 113 So. 708 (1927).
- 2 Tilden v. Smith, 94 Fla. 502, 113 So. 708 (1927).
- 3 Tilden v. Smith, 94 Fla. 502, 113 So. 708 (1927).
- 4 Preston v. Clark, 238 Mich. 632, 214 N.W. 226, 53 A.L.R. 194 (1927).
- 5 In re Change to Established Water Level of Lake of Woods in Marshall County, 822 N.E.2d 1032 (Ind. Ct. App. 2005).

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III. Particular Types of Waters or Water Bodies

B. Lakes and Ponds

3. Uses; Public and Private Rights

§ 134. Drainage; outlet

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Water Law](#)  1171

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[Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 A.L.R.2d 1450](#)

Forms

[Am. Jur. Pleading and Practice Forms, Waters § 289](#) (Judgment or decree—Enjoining drainage of natural lake—Ordering filling of drainage ditch)

It is generally held that where surface waters by natural drainage collect in a natural basin or depression, and escape from it only by percolation or evaporation, forming a lake, marsh, or pond, permanent in character, that water may not by artificial means, other than that incident to the cultivation of the soil, be drained to the damage of a lower proprietor, without liability in damages for that act.¹ The owner of land on which a marsh is situated may not widen and deepen a depression in a natural barrier through which the water runs from the marsh into a pond on the owner's land, from which it runs off onto adjoining

land.² There are, however, decisions to the effect that when reasonably necessary, the owner of land has the right to drain natural ponds by artificial means although the water is discharged upon adjoining premises.³ Even in some of the cases supporting the general rule that lakes or ponds may not be drained by artificial means, it is admitted that if the swamp or pond has a natural outlet through a stream or other natural drain, the landowner may drain the swamp or pond into it, thus increase the volume, and accelerate the flow into the stream without incurring liability, even though the stream flows over the land of another and does some incidental damage by reason of its increased flow.⁴ Similarly, one owner may drain a lake situated on its property, even though that would cause drainage of a smaller connecting lake that was situated on the plaintiff's property, since the first owner is not required to maintain the lake on its property for the plaintiff's use and enjoyment.⁵

Observation:

Statutory or regulatory requirements govern such matters as whether a dam built to create a farm pond must have a pass through device.⁶

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Footnotes

- 1 [Jontz v. Northup](#), 157 Iowa 6, 137 N.W. 1056 (1912); [Schrag v. Blaze Fork Drainage Dist.](#), 119 Kan. 169, 237 P. 1047 (1925).
- 2 [Noyes v. Cosselman](#), 29 Wash. 635, 70 P. 61 (1902).
- 3 [Werner v. Popp](#), 94 Minn. 118, 102 N.W. 366 (1905), *aff'd*, 94 Minn. 521, 103 N.W. 164 (1905); [Shaw v. Ward](#), 131 Wis. 646, 111 N.W. 671 (1907).
- 4 [Fenton & Thompson R. Co. v. Adams](#), 221 Ill. 201, 77 N.E. 531 (1906).
- 5 [Purser v. Solid Ground Development, LLC](#), 45 So. 3d 1249 (Ala. 2010).
- 6 [Koch v. Aupperle](#), 274 Neb. 52, 737 N.W.2d 869 (2007) (not required for a dam having less than a specified impoundment capacity).

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